SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 133

NORTON COMPANY, A CORPORATION,
PETITIONER,

vs.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OF ILLINOIS

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[fol. a] [Caption omitted]

[fol. 1]

IN THE SUPREME COURT OF ILLINOIS, SEPTEMBER TERM, A. D. 1949

NORTON COMPANY, a Corporation, Plaintiff-Appellant,

vs.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS, Defendant-Appellee.

Appeal from Circuit Court, Sangamon County

Honorable DeWitt S. Crow, Judge Presiding.

Abstract of Record—Filed August 19, 1949

COMPLAINT

Complaint at law of Norton Company, filed April 7, 1948, to review administrative decision of defendant, says:

1-2. Plaintiff is a Massachusetts corporation, not having its principal place of business in Illinois.

3. Defendant is an administrative agency, chargeable with administering an act entitled "An Act in Relation to a Tax upon Persons Engaged in the Business of Selling Tangible Personal Property to Purchasers for Use or Consumption", approved June 28, 1933, in force July 1, 1933, as Amended.

4. Plaintiff filed its claim for credit in the sum of $100,692.01.

5. Department tentatively denied claim and plaintiff duly filed its protest and demanded a hearing.

[fol. 2] 6. A final administrative decision was made by department, copy attached to complaint as "Exhibit A".

7. Said final administrative decision affects the legal rights and privileges of Norton Company and terminates the proceedings before the department.

8. Demand made on Department of Revenue to file entire record of proceedings under review, including entire tran-

script of evidence heard by it, stipulation of the parties and exhibits admitted in evidence as part of the record.

9. A specification of the errors relied upon by plaintiff for reversal of said final administrative decision, insofar as the Department of Revenue did not approve the balance of plaintiff's claim in the sum of $96,581.90, is as follows:

a. Said decision is contrary to law;

b. Said decision is contrary to the evidence;

c. Said decision is contrary to the law and the evidence;

d. Said decision violates section 8 of Article I of the Constitution of the United States;

e. Said decision is contrary to the provisions of "An Act in Relation to a Tax Upon Persons Engaged in the Business of Selling Tangible Personal Property to Purchasers for Use or Consumption," approved June 28, 1933, in force July 1, 1933, as Amended;

f. Refusal of the Department of Revenue to approve plaintiff's claim in its entirety, constitutes an attempt by the State of Illinois illegally to tax interstate commerce;

g. Refusal of the Department of Revenue of the State of [fol. 3] Illinois to approve plaintiff's claim in its entirety constitutes an attempt by the State of Illinois to tax plaintiff on business of selling tangible personal property other than in the State of Illinois;

h. The sales of plaintiff which were the basis of its claim for refund were sales made by plaintiff while not engaged in the business of selling tangible personal property in the State of Illinois;

i. The refusal of the Department of Revenue to allow plaintiff's claim in its entirety constitutes an attempt by the State of Illinois to tax plaintiff's sales although plaintiff, as to such sales, was not engaged in the business of selling tangible personal property in the State of Illinois;

j. Plaintiff's claim for refund to recover tax paid which was not due under the provisions of the Retailers' Occupation Tax Act is based upon sales, the orders for which were accepted in the State of Massachusetts for goods manufactured in the State of Massachusetts and shipped from Massachusetts to Illinois customers, f. o. b. Worcester;

k. Refusal of defendant to approve plaintiff's claim in its entirety constitutes an erroneous finding by defendant that, as to the sales which were the basis of plaintiff's claim, plaintiff was engaged in the business of selling tangible personal property in the State of Illinois.

Wherefore, Plaintiff prays that:

1. The approval by the Department of Revenue of part of plaintiff's claim in the sum of $4110.11 be affirmed;

2. The decision of the Department disapproving the balance of plaintiff's claim in the sum of $96,581.90 be reversed and the cause remanded with a direction to the [fol. 4] Department of Revenue to approve the balance of plaintiff's claim in the sum of $96,581.90;

3. Plaintiff have such other and further relief in the premises as to the court shall seem meet.

Signature and affidavit re last known address of Department of Revenue upon whom service shall be made.

Exhibit "A" Attached to Said Complaint Is as Follows:

Department's Final Determination of Claim

2. * The claim should be approved in part, and the same is accordingly approved and Credit Memorandum will be issued in the amount of $4,110.11. The Department does not approve of the balance of your claim of $96,581.90.

"Exhibit A"

Summons issued April 7, 1948, and served on defendant.

Answer

Answer of defendant filed August 9, 1948, alleges defendant filed transcript of proceedings as an answer to the complaint.

Answer consisting of the record of proceedings on review by the Department, which original answer is incorporated in this record on appeal by the order of court and may be found in a separate volume known as Volume II.

Motion by defendant for specification of errors.

Notice of plaintiff for hearing on motion to strike parts of record, together with proof of service.

NOTICE OF MOTION TO STRIKE

Notice of motion of plaintiff to strike from the record of proceedings on review filed on August 9, 1948, that part [fol. 5] thereof at the end consisting of pages 1 to 42 inclusive, which the hearing officer designated as "A Brief Resume of the Testimony of Evidence."

MOTION TO DISMISS

Motion by defendant to dismiss complaint because the court had no jurisdiction of the person of the defendant or the subject matter of the suit in that the defendant is a department of the state government of Illinois and under Article IV, Section 26 of the Constitution of Illinois the State of Illinois cannot be made a party defendant in any suit at law or equity.

JUDGMENT

Oral motion by plaintiff for a finding of fact by the trial court allowed: Motion of defendant to strike complaint because it is a suit against the State of Illinois, denied; motion by plaintiff to strike the abstract or resume of the testimony from the finding of fact by hearing officer of the Department of Revenue of the State of Illinois, denied; decision of the Department of Revenue of the State of Illinois affirmed; the order entered April 14, 1949, is as follows, to-wit:

"Order

This matter coming on regularly to be heard upon the complaint of Norton Company, a corporation, to review an administrative decision of the Department of Revenue of the State of Illinois, and answer and record on review and on motion of the defendant to strike the complaint because it is a suit against the State of Illinois, and on motion of plaintiff to strike the resume or abstract of the testimony from the findings of fact contained in the record of proceedings on review filed herein August 9, 1948, and the plaintiff being represented by Hansen & Towle, its attorneys, and the defendant being represented by the Honorable Ivan Elliott, attorney general of the State of Illinois, and the court having jurisdiction of the parties hereto and the subject matter hereof and having heard the arguments

of counsel and being fully advised finds: that the orders [fol. 6] involved herein which were the basis of the claim for credit originated from Illinois prospective purchasers on order forms supplied solely by the purchasers in their regular course of business, and in most cases directed to the Norton Company in Chicago, at a place where the Norton Company maintained a warehouse and place for retail sale, under a license as a foreign corporation to do business in Illinois; a limited number of items sold and manufactured by the Norton Company were carried in the Illinois place of business; the Illinois office maintained a credit department on information supplied by the home office in Worcester, Massachusetts; an order first received at Chicago was checked for credit and a symbol or letter placed on the order to denote the same and a discount rate or percentage mark was also stamped on the order as received before the items sought to be purchased were actually checked to determine if in stock in the Chicago office; the Chicago office had no authority to accept or reject any order; any unfilled order, or partial unfilled order, after having been stamped for credit and discount as aforesaid, so far as Chicago was concerned, was sent to the home office without comment, which said home office had sole authority to accept or reject the order upon the basis of their own checking for credit, ability to manufacture, or upon any other basis; billing to the customer on orders then filled was made direct to the customer, correspondence had direct with customer, and payment made direct from customer to the home office; billing although indicated 'f. o. b. home office'; articles were in fact prepaid to the customer with the home office packaging goods marked to customers' names and addresses in Illinois, but packages actually sent in most cases in carload shipments care of Norton Company, Chicago office, and then delivery by Chicago office to customers in Illinois; that under this state of facts, and with respect to the mode of doing business in Illinois, notwithstanding the sole authority for accepting or rejecting the order rested in the home office,—and notwith- [fol. 7] standing the home office acted independently as to credit, discount, ability to manufacture, or willingness to fill any order, yet such orders as received which

flowed through the Chicago office were subsequently filled in the total or part, bearing the credit and discount marks of the Chicago office. The court is of the opinion that the filling of said orders by the home office and the delivery of the goods thereof, as indicated, amounted to a ratification in part or in total, of some act or doing of the Chicago office in respect to said orders, which, of course, were originally carried in Chicago stock and credit approved in Chicago; that even though said goods may have been shipped in interstate commerce, said sales were within the purview of the Illinois Occupational Tax, and, therefore, taxable,

It Is Ordered that the motion of the defendant to strike the complaint because it is a suit against the State of Illinois, is denied.

It Is Ordered that the motion of the plaintiff to strike the abstract or resume of the testimony from the findings of fact is denied.

It Is Ordered that the administrative decision of the Department of Revenue, allowing plaintiff's claim in the sum of $4,110.10 is affirmed and the decision of the Department of Revenue disallowing the balance of plaintiff's claim in the sum of $96,581.90, is affirmed.

Enter:

DeWitt S. Crow, Judge.

4-14-49

Filed April 14, 1949. J. Harry Happer, Clerk.

NOTICE OF APPEAL

April 22, 1949, notice of appeal and proof of service filed.

Appeal to the Supreme Court of Illinois from Circuit Court of Sangamon County from that part of final order [fol. 8] entered in the Circuit Court of Sangamon County, Illinois, in the above entitled cause on the 14th day of April, 1949, which affirmed the decision of the Department of Revenue of the State of Illinois, disallowing plaintiff's claim for credit in the sum of $96,581.09, and which denied the motion of plaintiff-appellant to strike the abstract or resume of testimony from the findings of fact by the hearing officer contained in the record of proceedings on review filed August 9, 1948.

Plaintiff-appellant desires a review of that part of said order entered April 14, 1949, and prays that said part of

said order be reversed and that an order be entered allowing the balance of plaintiff's claim for credit in the sum of $96,581.09 against the Department of Revenue of the State of Illinois, or in the alternative, that this cause be remanded with instructions to the Department of Revenue of the State of Illinois to issue to Norton Company, a credit memorandum in the sum of $96,581.09.

Service on attorney general of the State of Illinois, attorney for the Department of Revenue of the State of Illinois April 22, 1949.

Praecipe for record and proof of service thereof.

CLERK'S CERTIFICATE

Clerk's certificate of correctness of transcript of record and proceedings and certifying that the original answer of defendant filed August 9, 1948, consisting of record and proceedings on review by the Department of Revenue of the State of Illinois is incorporated in this transcript of record on appeal by order of court entered April 22, 1949 and will be found under separate volume known as Volume II; also shows costs paid by attorneys for appellant.

[fol. 9] **Record of Proceedings on Review by Department of Revenue of State of Illinois**

Wrapper of original record of proceedings under review, filed August 9, 1948, in case number 94300 in the Circuit Court of Sangamon County, registration number 35598.

Dept's. Ex. 1, letter of authority to Joseph P. Immel to conduct hearing; Dept's. Ex. 2, claim for credit filed by Norton Company under date of December 26, 1944, in the sum of $100,692.01; Dept's. Ex. 3, notice of determination of claim for credit denying claim; Dept's. Ex. 4, receipt of notice of determination.

Dept's. Ex. 5, protest against tentative denial by Norton Company, dated May 10, 1945; Dept's. Ex. 6, power of attorney from Norton Company that Hansen & Towle have been retained as counsel; Dept's. Ex. 7, notice of hearing; Dept's. Ex. 8, receipt for notice of hearing, no objections.

Exhibits 1 to 8 admitted.

LOUIS J. KLINGMAN, a witness for defendant, testified: Have been a field auditor of the Department since 1937;

have had occasion to audit matters in connection with Retailers' Occupation Tax Act; hold position by virtue of having passed Civil Service examination; was an auditor prior to services with Department; was assigned to audit books and records of Norton Company; went to Worcester, Massachusetts to make an audit for a claim for credit filed by the Norton Company; audit is a series of work sheets consisting of 45 pages and an index.

(Marked for identification Ex. No. 9.)

[fol. 10] Audit was prepared on a gross sales basis and with the agreement of the taxpayer to a test check proposition; we made a complete audit for the month of July, 1944; made an analysis of the sales by 14 different classifications and arrived at a percentage of claim allowed based on the month of July, which covered the entire period of the claim from July 1, 1941 through September 30, 1944, inclusive, which taxpayer accepted; the classifications are found on page 12 of the audit; apprised taxpayer of findings.

Mr. Towle: I object to the conclusions of auditor where he uses the language "Summary of findings and reconciliation of claim", describing the claim as "Transcript of Chicago Branch Sales", and "Recap of Total Taxable Sales," Month of July, 1944, "Summary of Taxable Chicago Branch Sales" Shipped into Illinois from Worcester plant, care of Chicago Store; no objections made to the figures contained in the audit; the objections were directed to the conclusions of the auditor and the attempts to disallow part of the claim.

Witness resuming: I made a transcript of taxpayer's monthly returns for the period in question for the various months in question and found that those monthly returns reflected all the business transacted by the taxpayer and represents the sales that went into the State of Illinois; the books of the company tied in with all the sales that were applicable to the State of Illinois, as far as the returns are concerned; I verified in any case where a tax had been added to a sale by the Norton Company, a tax having been paid to the State and was later refunded to the customer.

Mr. Immel, Jr.: So there is no question here for reimbursement where it was added to the invoice?

A. That is right.

[fol. 11] In my audit of the sales tax returns and the general books and ledgers and accounts of the Norton Com-

pany, I found that the gross sales reported by Norton Company in its monthly returns to the Department of Revenue, were in balance with the gross sales with the general ledger; in auditing the records of the company, I verified the amounts claimed by the taxpayer, by months, as shown on its claim for credit which were reported as taxable sales to the State of Illinois; I determined that the taxpayer was entitled to claim for refund in the amount of $4,110.11; that conclusion was based on sales of machinery and equipment, whereby the order was received by the home office in Massachusetts, and the home office was the only one that had a right to accept or reject an order, and that the blueprints and other specifications were sent direct to them and that no salesmen or branch office had any authorization over these particular orders, which in any case, according to the Act, is an interstate sale; the balance of the claim I disallowed; in addition, we have a purchase order from the Norton Company which specifically states on that purchase order, "Subject to acceptance in writing by the Norton Company at the main office in Worcester, Massachusetts; this order is only for machinery and equipment, and does not apply against the other orders; the balance of the claim did not involve machinery or equipment sales; on all sales—the balance of the claim in question—other than machinery and equipment, refunds were made; I actually verified those refunds; prior to May, 1942, all taxes allegedly paid by Norton Company was refunded and verified as shown in the audit; after May, 1942, no tax was added by the taxpayer therein and it bore the burden.

[fol. 12] E. E. McConnell, a witness for Norton Co., testified:

Norton Company is incorporated in Massachusetts; it is engaged in the manufacture and sale of grinding machines, grinding wheels and abrasive products; the main office and factory are at Worcester, Massachusetts; Norton Company is authorized to do business in Illinois as a foreign corporation; it maintains an office and warehouse in Chicago; no one in Chicago office has authority to accept an order for grinding machines; orders for grinding machines are accepted or rejected at the main office at Worcester; no one at Chicago has authority to accept or reject an order for abrasive products or grinding wheels unless the merchan-

dise is actually on hand at Chicago warehouse; if the merchandise is not on hand at the Chicago warehouse, no one at Chicago has authority to accept or reject an order;

Dept's. Ex. 9 admitted in evidence.

Page 4, second column of Dept's. Ex. 9, shows that the total retail sales of Norton Company in Illinois for the period from July 1, 1941 to and including the month of September, 1944, was $25,729,415.89 those sales include sales made on merchandise on hand at the Chicago warehouse; page 5 of Ex. 9 shows that the total sales of merchandise on hand in Chicago warehouse was $5,041,672.53; no part of the Norton Company claim for credit is made on sales of merchandise on hand in the Chicago warehouse; Norton Company's claim for credit is based only on sales of machinery, grinding wheels and abrasive products, manufactured at Worcester, Massachusetts, and shipped from Worcester, on orders accepted at Worcester.

[fol. 13] (Agreement between Mr. Immel and Mr. Towle that the 14 classifications of sales listed on page 12 of Ex. 9 be reduced to a smaller number of classifications:

Line 1 of page 1 to be known as Class "A"
Lines 2 and 3 to be known as Class "B"
Lines 4 and 5 to be known as Class "C"
Lines 6 and 7 to be known as Class "E"
Lines 8 and 9 to be known as Class "G"
Lines 10 and 11 to be known as Class "F"
Lines 12 and 13 to be known as Class "D"
Line 14 to be known as Class "H")

Class A sales or machinery and equipment sales for machinery and equipment manufactured at Worcester, on orders accepted in Massachusetts.

(Stipulation that that part of the claim for credit in the sum of $4,110.11, representing a tax on machinery and equipment sales is allowed, which is part of the original claim.)

Those sales are machinery and equipment sales on orders accepted and manufactured at Worcester; shipped from Worcester directly to the customer; tax added to the invoice; tax collected and paid to the State of Illinois and later refunded to the customer.

Class B sales are sales of abrasive products on orders accepted in Worcester, for goods manufactured at Worces-

ter, for goods packed and wrapped, ready for delivery to customer, addressed to the customer and shipped in carload lots consigned to the Norton Company, Chicago, which in turn, made delivery to Chicago customers, or forwarded the various packages to customers outside of Chicago; that was done to save transportation charges.

Lines 4 and 5 on page 12 of Ex. 9 are sales on orders ac-
[fol. 14] cepted at Worcester, goods manufactured at Worcester and shipped from Worcester direct to customers in Chicago and Illinois; they are shipped by freight and express prepaid, f.o.b. Worcester.

Referring to lines 12 and 13, those are known as Class D sales; they are sales of abrasive products on orders accepted at Worcester, goods manufactured at Worcester, goods packed, wrapped and ready for delivery, shipped in carload lots consigned to Norton Company, and Chicago office, in turn, made delivery to the Chicago customers or forwarded the packages to customers outside of Chicago; tax was added to the invoice, paid to the state and later refunded to the customer.

Lines 6 and 7 are Class E sales and refer to sales of abrasive products; the orders for those sales were accepted at Worcester, goods manufactured at Worcester, they are shipped from Worcester directly to customer in Illinois, f.o.b. Worcester;

Referring to lines 10 and 11, those are known as Class F sales; they are also sales of abrasive products, accepted at Worcester, Massachusetts, goods manufactured at Worcester; they are shipped from Worcester directly to the customers in Illinois, f.o.b. Worcester; tax was paid to the State of Illinois and refunded to the customer.

Lines 8 and 9 are Class G sales; they are sales of abrasive products; the orders for those sales were accepted at Worcester, Massachusetts; goods manufactured at Worcester and were shipped from Worcester directly to customer in States of Illinois; they were shipped parcel post; all of those letters, A to G inclusive, are sales f.o.b. Worcester; Norton Company bore the burden of the Retailers' Occupation Tax on all sales upon which its claim is based; Norton
[fol. 15] Company has not been relieved of those taxes; it has not been reimbursed therefor; the Norton Company has not shifted such burden directly or indirectly through the inclusion of such amount in the price of the tangible

personal property sold by it in any manner whatsoever; there is no understanding or agreement, written or oral, that exists whereby Norton Company may be relieved of the burden of such amount of taxes; Norton Company has not been reimbursed therefor nor has it shifted the burden of the taxes in any manner whatsoever; in those cases where the Retailers' Occupation Tax has been added on the sales price of tangible personal property sold by the Norton Company to its customers, it has repaid unconditionally such amounts to its vendees who bore the burden thereof; Norton Company has not been relieved of such repayments nor has it been reimbursed therefor; Norton Company has not shifted the burden directly or indirectly; it is not entitled to receive any reimbursement thereof from any source; it has not been relieved from such burden in any manner; since April 20, 1942, the Norton Company discontinued billing and collecting the Retailers' Occupation Tax on grinding wheels; those sales were included in the monthly reports of the Norton Company and the tax paid and absorbed by the Norton Company; those orders for wheels were accepted at Worcester; the wheels were manufactured at Worcester and shipped from Worcester; they were shipped either directly to the customer or packed and wrapped, ready for delivery to customer, and shipped in carload lots consigned to Norton Company, Chicago, which in turn made delivery to Chicago customers or forwarded the various packages to customers outside of Chicago; I am comptroller of the Norton Company; as such I am in charge [fol. 16] of the books and records and fiscal policy of the company; I caused a memorandum of the tax absorbed on wheel shipments to be made from May, 1942 to September, 1944.

Ex. marked as Taxpayer's Ex. 1.

It was prepared from the records of Norton Company under my supervision and at my direction; it reflects the tax paid on wheel shipments on contracts accepted in Worcester and manufactured and shipped from Worcester.

Taxpayer's Ex. 1 admitted in evidence, subject to cross-examination and verification.

The claim of the Norton Company filed with the Department of Revenue includes those taxes; the prices charged an Illinois customer were the same as those charged

to customers in other states for the same article at the same time; there has been no attempt made to hide this additional expense in the selling price to users in Illinois; page 12 of the audit shows that the total sales for the month of July was $155,042.51; referring to line 14, which is Class H sales, the amount of those sales for the month of July, 1944 were $16,269.58; Class H sales was 10.42% of the total sales for that month; referring to lines 2, 3, 12 and 13, the first 2 lines are Class B sales, and the last 2 lines are Class D sales; those are sales for the month of July, 1944, on orders accepted at Worcester, Massachusetts; the goods were manufactured at Worcester, Massachusetts; goods packed, wrapped and ready for delivery; those packages contained the addresses of the customers; they were shipped in carload lots to Chicago; Chicago warehouse, in turn, made delivery to the Chicago customers; it also made delivery to customers outside of Chicago in Illinois; that method was [fol. 17] used to save transportation charges; the total sales of Class B and Class D sales was $76,896.71; the total of Class B sales and Class D sales for the month of July, 1944, was 45.59% referring to the balance of the sales on that page of that exhibit, lines 1, 4, 5, 6, 7, 8, 10, 11, which are classes A, C, E, F and G, those were sales for the month of July, 1944 on contracts accepted at Worcester, Massachusetts; the title passed in Worcester, Massachusetts by the physical delivery of the goods in that state; they were shipped by common carrier, by parcel post from Worcester; they were addressed to customers in Illinois; those sales total $61,876.22; those sales are 33.99% of the total sales for the month of July, 1944; the general ledgers, books, records, invoices etc. of the Norton Company are kept at Worcester, Massachusetts; Norton Company maintains a copy of the invoice on shipments made directly from stock carried in the Chicago warehouse; it does its own billing on its own sales, but requests payments to be made at Worcester; in the event the Chicago office receives an order for merchandise which it cannot fill because the merchandise is not on hand; the Chicago office has no authority to accept or reject the the order; Chicago office forwards the order to Worcester for acceptance or rejection; if the order is accepted and if the item is not a stock item, it is manufactured in accordance with the specifications at Worcester, Massachusetts; if the items ordered are actually carried in stock, they are supplied from the inventory at Wor-

cester; the merchandise is then sent to the customer from Worcester; Norton Company manufactures approximately 225,000 different kinds of abrasive products at Worcester; approximately 18,000 items are kept on hand at the Worcester plant in its inventory; there are approximately 3000 [fol. 18] items carried in Chicago warehouse; the sale of grinding wheels constitutes the major portion of sales of the Norton Company; because of the many types, sizes and qualities of grinding wheels used by the industry in general it is impossible to keep many of the types on hand; most of the grinding wheels ordered are specially manufactured; with reference to the sales by the Chicago office on merchandise actually on hand in Chicago, the Chicago office is furnished with an approved credit customer list by the credit department at Worcester; the Chicago office goes by that list; any orders received from customers, who are not on the approved credit list must be forwarded to Worcester for acceptance or rejection even though the items will be carried in Chicago; when an order is received at Worcester, it is acknowledged; we sometimes use a postal card for a form of acknowledgment; taxpayer's Ex. 2 is a form of acknowledgment of order showing the order number, item number and shipping date, which is sent from Worcester.

(Taxpayer's Ex. 2 admitted in evidence.)

Taxpayer's Ex. 3 is an acknowledgment of an order that has to be corrected due to manufacturing difficulties; it is sent from Worcester, admitted in evidence.

Taxpayer's Ex. 4, admitted in evidence, is another form of corrected acknowledgment of order sent from Worcester.

Taxpayer's Ex. 5, admitted in evidence, is another form of acknowledgment of order, notifying customer of shipping date sent from Worcester.

Taxpayer's Ex. 6, admitted in evidence, is a copy of the proposal of the grinding machine division of the Norton Company.

[fol. 19] Taxpayer's Exs. 7, 8, 9 and 10 are forms of invoices used by Norton Company at Worcester, Massachusetts, and admitted in evidence.

I have been with the Norton Company since July 1, 1935; I am a graduate of Northeastern University with a Bachelor of Commercial Science degree in master business administration, certified public accountant; I am president of the

Comptrollers' Institute of America, which is an organization comprised of comptrollers of all or many of the large corporations of the United States; a comptroller of a company has supervision of all accounting records including, cost, payroll, timekeeping, financial records and in some cases, taxation matters of the corporation; in my capacity as comptroller of Norton Company, I am familiar with the records of the Norton Company; they are kept under my supervision; Taxpayer's Ex. 11 admitted in evidence, is an order from Ingersoll Milling Machine Company, accepted at Worcester for machine repair parts which was shipped to the customer by parcel post; that is a class A sale.

Mr. Towle: We will take these orders one at a time, to show how the company functions.

(Witness continuing) The order was addressed to the Norton Company at 4737 S. Christiana Avenue, Chicago; when the order was received by the Chicago office, it stamped the order received, and forwarded it to Worcester for acceptance or rejection; no part of the order was filled at Chicago; Sheet No. 2 of that exhibit entitled "Grinding Machine Division, Parts Order Blank", was filled at Worcester; Sheet No. 3 is an invoice.

Taxpayer's Ex. 12 admitted in evidence is an order from Continental Bridge Company; the second sheet is an ac- [fol. 20] knowledgment and the third sheet is an invoice; it is an order received and accepted at Worcester, Massachusetts, addressed to the Norton Company at Worcester, Massachusetts, for one drill grinding wheel; the order was acknowledged and sheet number 2 is an acknowledgment sent by the company; sheet number 3 is the invoice; the merchandise was shipped parcel post from Worcester, f. o. b.; the Continental Bridge Company is at Peotone, Illinois; that would be class G sale; those are sales of abrasive products on orders accepted at Worcester, manufactured at Worcester, shipped from Worcester directly to customer in Illinois by parcel post.

Taxpayer's Ex. 13 admitted in evidence is an order received from C. S. Johnson Company, accepted at Worcester for 2 grinding wheels; the first sheet is a rough drawing of the wheel; next sheet is an acknowledgment of the order and expected date of shipment; the next 2 sheets are manufacturing checks made out at Worcester for the manufacture of the wheels; a manufacturing check is made out by

our Planning Department for the production in the plant of the wheel; on the reverse side, it shows the various operations and the employes performing those operations and the date of performance; it also has on the check the formula used for making this wheel and special instructions in the manufacture of the wheel; it then becomes a blueprint which the man in the plant actually manufactures; it also shows what parts or material were used and the formula by which the parts were made into grinding wheels; it shows the employes and the operations performed on the job; it does not show the time that was spent on the job; the order also in- [fol. 21] cludes the two invoices mailed to the purchaser to Champaign, Illinois; it also shows the order was acknowledged; this is a class C sale.

Taxpayer's Ex. 14 admitted in evidence is an order from Buick Motor Division, General Motors Corporation, Melrose Park, for 12 grinding wheels, received at Worcester, Massachusetts; the order was acknowledged from Worcester, accepted at Worcester, credit approved at Worcester, goods manufactured at Worcester; sheet No. 2 is a manufacturing check prepared at Worcester; sheet No. 3 is the acknowledgment of an order sent from Worcester; the acknowledgment identifies the order number and date of shipment; sheet No. 4 is an invoice; it shows that the items ordered were put in packages, marked with the name and address of the customer on it and the contents contained therein; package was wrapped and sealed and had number 599 on it; it was part of a large shipment on that date made to Illinois customers; it was included in a freight car of other and similar packages and shipped to Chicago, in care of the Chicago warehouse; upon receipt of that box car of orders, the functions or duty of the man handling such a car in Chicago, was to forward the packages to the customers; he had nothing to do with the billing of the order; the employe at the Chicago warehouse would take each package and deliver it to the trucking company for delivery to the customer or send it parcel post from Chicago, or express out of Chicago, if it happened to be a downstate customer; other than the mere routing of the package, the Chicago warehouse had nothing to do with this particular order; shipments are handled that way to save transportation charges; other than the mere transfer of the parcel from the freight car to a

truck or into express channels, the Chicago office had nothing else to do with it; this is a class B sale.

[fol. 22] Taxpayer's Ex. 15 admitted in evidence is a purchase order received from Kraut & Dohnal, received and accepted at Worcester, Massachusetts, for 12 grinding wheels; the order was acknowledged and is so stamped; these and the other orders all bear a Worcester number and the customer number; so it can be identified; the order also contains a manufacturing check for 18 wheels; it becomes a blueprint so the workmen in the plant can manufacture the wheels specially; sheet No. 3 is an acknowledgment and estimated date of shipment and shows customer's order number; sheet No. 4 is an invoice sent to the customer, billed and sent to the Chicago warehouse for reshipment, f. o. b. Worcester; the wheels ordered were packed, wrapped and addressed to Kraut & Dohnal, Chicago, and had number 3636; this order was shipped as the previous order was sent, in carload lot; this is also class B sale.

Ex. 16 admitted in evidence is an order from University of Chicago sent to the Chicago warehouse for 48 wheels; upon receipt of that order, Chicago office forwarded it to Worcester for acceptance or rejection; Chicago office did nothing other than place a stamp on it, showing the date it was received; the order also contains a stamp showing it was received at Worcester; the order contains shipping instructions, requesting they be shipped f. o. b. to a shipping point; the third sheet in the order is a certificate of priority executed by the purchasing agent of the University of Chicago; sheets 4 and 5 are manufacturing checks covering the manufactured merchandise prepared at Worcester; these contain directions to the employes as to how to manufacture the 48 thermocouple tubes; the manufacturing checks, as all those previously admitted in evidence, contained com-

[fol. 23] plete data as to the quantity, diagram, thickness, hole, face, formula, grade, price and how the articles are to be shipped and what the instructions are to the shaving and moulding department, etc.; from this and similar manufacturing checks, various departments in the plant at Worcester can manufacture the articles requested; the last sheet in the order is the acknowledgment, sent to the customer; as do all other acknowledgments admitted in evidence, the invoice was sent to the University of Chicago; those articles were shipped parcel post, Worcester, Massachusetts, direct

to the customer, attention Wattenberg Argonne; that is a class G Sale.

Ex. 17 admitted in evidence is an order received at Worcester from the American Car and Foundry Company, New York City, for delivery to the Car Department at Madison, Illinois, for 2 grinding wheels; the order was accepted at Worcester, Massachusetts; it was acknowledged from Worcester and contains shipping instructions, the customer's order number, list price of wheels and priority certification; sheet number 2 is an invoice for 2 grinding wheels, showing the items shipped f. o. b. Worcester; this is a class C Sale; the acknowledgment of order was sent from Worcester; manufacturing check was prepared at Worcester.

Ex. 18 is an order from Standard Lime & Stone Company, Baltimore, for delivery to itself at McCook, Illinois; directs the shipment be express prepaid; order was acknowledged; shows date it was received, bears customer's number and Worcester number; it is acknowledged; had manufacturing checks prepared at Worcester; invoice shows items were shipped f. o. b. Worcester; the articles ordered were manufactured at Worcester; order accepted at Worcester; this is either class C or class E.

[fol. 24] Taxpayer's Ex. 19 admitted in evidence is an order from Charter Gas Engine Works, Sterling, Illinois, received and accepted at Worcester; acknowledged from Worcester; manufacturing check prepared at Worcester; invoice directs showing shipment by parcel post, f. o. b. Worcester; this is class G sale.

Ex. 20, admitted in evidence is order from Butler Manufacturing Company, Galesburg, received at Worcester; shows the stamp of acknowledgment at Worcester, date it was received with customer's number; purchase order contained shipping instructions; acknowledgment of the order sent from Worcester; the articles mentioned in the manufacturing check were manufactured at Worcester; invoice shows the merchandise shipped in carload lot to Chicago warehouse, f. o. b. Worcester and was handled as some of the others where the items were packed, wrapped, marked for the Butler Manufacturing Company, addressed to it and given a package number; that is a class B sale.

Ex. 21 admitted in evidence is an order received from Greenlee Brothers & Company at Chicago, for manufacturing of a grinding machine; received at Chicago; was for-

warded to Worcester, received at Worcester and accepted at Worcester; order directs how the merchandise was to be shipped; shipping check was prepared at Worcester; invoice shows Illinois Occupation Tax was added and paid by the Norton Company to the State of Illinois and later refunded to the customer at Rockford; this is a class A sale.

Ex. 22 admitted in evidence is an order received at Worcester from Atchison, Topeka & Santa Fe Railway; directs how the item is to be shipped f. o. b. shipping point; item [fol. 25] ordered was manufactured at Worcester; order was acknowledged; invoice shows merchandise was shipped to customer at Corwith, Illinois, freight f. o. b. Worcester; this is a class C or E order.

Taxpayer's Ex. 23 admitted in evidence is an order from Fansteel Metallurgical Corporation, North Chicago, Illinois; sent to the Chicago warehouse, confirming a teletype order which was sent direct to Worcester; the only thing the Chicago warehouse had to do with the order was to forward it to Worcester for acceptance or rejection; Chicago office put a stamp on it showing the date they received the order; sheet number 2 of that order is a telegram forwarded to the customer, acknowledging the order from Worcester; sheet number 3 is a telegram order for 500 grinding wheels received at Worcester; sheet number 4 is an invoice covering the shipment of part of the order showing shipment f.o.b. Worcester; this is class C and class E.

Taxpayer's Ex. 24 admitted in evidence is an order received at Worcester, Massachusetts, from the Brown Machine Company; directs the order to be shipped c.o.d.; shows the date it was acknowledged; sheet number 2 is the acknowledgment order; sheet number 3 is the manufacturing check; sheet 4 is invoice showing shipment f.o.b. Worcester, care of Chicago store, c.o.d.; this is a class B sale.

Taxpayer's Ex. 25 admitted in evidence is an order from Forster Brothers, Melrose Park, received at Worcester for 12 grinding wheels; the order was acknowledged at Worcester; the article was shipped f.o.b. parcel post from Worcester; this is a class G sale.

Taxpayer's Ex. 26 admitted in evidence is an order received at Worcester from the Automotive Maintenance [fol. 26] Machinery Company; this is a class A sale; order

blank covering the machine was prepared at Worcester; Retailers' Occupation Tax was added to the invoice, paid to the State of Illinois and later refunded to the customer; machinery was shipped f.o.b. Worcester.

Ex. 27 admitted in evidence is an order received and accepted at Worcester, Massachusetts, from John Oster Manufacturing Company, Genoa, Illinois, for a grinding machine, which is class A sale; the order was accepted at Worcester; machine manufactured at Worcester; invoice showed that the machine was shipped f.o.b. Worcester; Illinois Occupation Tax added, tax paid by the Norton Company to the State of Illinois and later refunded to customer.

Cross-examination.

By Mr. Immel, Jr.:

I am fully acquainted with the operations of the Chicago office; Mr. Walston is office manager of the Chicago office; when I say Chicago warehouse, I mean a storage space and also a connecting office for business in the Chicago area; Chicago office receives orders by mail; they do not have salesmen in the Chicago office; we have abrasive engineers who go out to the customer and advise him on technicalities of grinding wheels, what wheels would perform the work, etc.; the engineers go in the field after the order is in; they do not solicit; it is just technical advice; we have no men in the field from the Chicago office taking orders; we have no men working at the Worcester office that come in and take orders in this area; the first contact with a customer when he calls or writes in, he specifies a type of product he wants to purchase; the type of orders that are received by the company are typical of the orders [fol. 27] admitted in evidence; the order from the customer may or may not specify in detail any information other than thickness or width of the wheel; we keep approximately 3000 items on hand in the Chicago warehouse, as contrasted with approximately 18,000 kept on hand at Worcester, as contrasted with a general catalog of 225,000 items; these relate primarily to abrasives; the reason why more than 3000 items are not kept on hand in Chicago is because the only things that can be retained in Chicago warehouse are standard items; by standard items, from a layman's point of view, would be items sold several times

a year; it would be a common type of wheel; in other words that item may be sold over a counter, that would be considered a stock item; the contents or size of the wheel make it vary as to the number of items and the cohesive in the wheel; the cohesive in the wheel varies because of the type of metals used upon it; grinding wheels are the bulk of the business; when an order is received at Chicago warehouse, it is possible that it may have some of the items on hand to fill the order, and other items that are not available at the Chicago warehouse; it is possible that some of those items may be similar or exactly alike, but they may be short of them at that particular time; if an order came in for 25 wheels, as catalog number 25, and only 12 were available, the local office under my previous testimony, would transship the order to Worcester for completion; that would be a split order; we have split orders in our business; there were none in evidence today; the percentage of business on split orders would be very small; Chicago office has the power to accept an order only where they can ship those items from stock in Chicago; the figures in Norton Company's Exhibit 1 were derived from the Business Analysis Department which is the Tabulat-
[fol. 28] ing Equipment Department; those figures were compiled by the business house under my direction; I testified that prior to April 30, 1942, the company included in its invoice to the customer of abrasive wheels, an amount sufficient to defray the Retailers' Occupation Tax expense and we made refunds prior to April 30, 1942 of the tax so paid in some cases; in the cases in which refund was made, those refunds are included in the audit on page 44; prior to April 30, 1942, we made refunds as reflected in the audit of $5,017.76 to customers where the invoices were for grinding wheels; after April 30, 1942 through and including September 30, 1944, we did not include a tax in our invoices for grinding wheels; when an order was received at Chicago and the item was not a stock item on hand, the procedure in detail, of transshipping the order to the Worcester office was as follows: The order was stamped at Chicago; they review the order and ascertain whether or not they can ship it from the Chicago stock; if it is not available in the Chicago stock, they send the order to Worcester for acceptance or rejection; no correspondence passes between the Chicago office and the Wor-

cester office in connection with that; any correspondence we have is directly with the customer; when the Chicago office sends the order to Worcester, they do not attach any letter; they just stamp it and forward it to Worcester; On class B sales, in which we made bulk shipments to Chicago by carload lots, the method of handling the shipment after the car was loaded and sealed to Chicago, Chicago office received a list of all the packages and Worcester sends the bill directly to the customer from Worcester; when an item is shipped by railway a bill of lading is made out in connection with the shipment with route [fol. 29] instructions to the railroad; Chicago warehouse has no discretion upon receiving the shipment in carload lots; Exhibit 15, purchase order from Kraut & Dohnal was first sent to Worcester and was not shipped through the Chicago office; the typical shipping instruction was put on at Worcester; the billing is from Worcester; the item there ordered is not a stock item; we don't change our stock requirements; the stock items would be filled in Chicago on the basis of turn-over requests—requests for delivery; if the Chicago warehouse indicates that a certain item is considered a volume item, it is considered a stock item; whether it is or whether it is not a stock item is determined primarily by the customer's needs; stock items change from time to time; included in stock items in the Chicago warehouse would be abrasive wheels; the manufacturing of those abrasive wheels, other than the cohesive quality that may be stuck in the wheel, or bond, as we call it, that variance is one of the principal variances between the type of abrasive wheels that is used; the abrasive in the wheel might vary as to size or character of the abrasive; it would be similar to the various brands of sandpaper from a standpoint of comparison, whether it is fine, course, medium, hard or soft; one of the facts to determine why a larger stock of items are not carried in Chicago would be the expense involved in maintaining the larger items of stock on hand, where the volume is not heavy, and the fact of obsolescence; no tax was added to any of the invoices reflected in this column of figures of taxpayer's Ex. 1; Taxpayer's Ex. 16, which was a sale to the University of Chicago, was a special order; special orders, as contrasted to wheels, is very small; this invoice is con- [fol. 30] sidered typical of the light refractories which

might be shipped: in addition to light refractories in wheels, we have the classification of heavy abrasives; on the type of abrasives to which I refer to as light and heavy refractories, I don't know whether a tax was added to the invoice after May 1, 1942.

Redirect examination.

By Mr. Towle:

Norton Company was incorporated in 1885 and has been in existence ever since; there is no manufacturer of abrasives in the world that does a larger volume of business than Norton Company.

Dept's. Ex. 1, letter of authority to Joseph Immel, Jr. to conduct hearing.

Dept's. Ex. 2, consisting of claim for credit by the Norton Company dated December 26, 1944, received by the Department of Revenue December 29, 1944, is as follows:

[fol. 31] DEPARTMENT'S EXHIBIT No. 2

Schedule A

Schedule showing taxable receipts reported and tax paid —receipts claimed non-taxable and refund claimed. For errors in computation in reported tax, enter amount of overpayment in Cols. 6 and 7, only

1	2	3	4	5	6	7
Year	Month	Taxable Sales Reported	Tax Paid	Amount of Sales included in Col. 3 on which credit is claimed	Amount Overpaid	Credit Claimed
1941	July	162554.08	3186.06	44049.49	863.37	863.37
	August	205729.62	4032.30	100089.79	1961.76	1961.76
	September	179418.51	3516.61	34894.90	683.94	683.94
	October	181676.79	3560.86	17854.59	349.95	349.50
	November	139476.09	2733.73	28553.06	559.64	559.64
	December	160557.72	3146.93	39959.69	783.21	783.21
1942	January	150221.33	2944.34	28219.39	553.10	553.10
	February	128282.51	2514.53	24173.47	473.80	473.80
	March	154695.47	3032.03	24219.39	474.70	474.70
	April	178786.14	3504.21	29835.20	584.77	584.77
	May	157078.39	3078.74	122026.02	2391.71	2391.71
	June	211337.40	4142.21	151752.04	2974.34	2974.34
	July	216586.86	4245.10	159854.08	3133.14	3133.14
	August	233560.38	4577.78	192739.79	3777.70	3777.70
	September	211394.08	4143.33	174385.71	3417.96	3417.96
	October	248351.68	4867.69	186199.48	3649.51	3649.51
	November	244121.17	4784.77	195657.14	3834.88	3834.88
	December	214885.19	4211.75	166414.79	3261.73	3261.73
1943	January	233479.19	4576.19	194972.44	3821.46	3821.46
	February	211639.61	4148.14	154870.91	3035.47	3035.47
	March	231819.54	4543.66	201674.48	3952.82	3952.82
	April	214654.55	4207.23	170316.83	3338.21	3338.21
	May	239963.01	4703.27	195242.34	3826.75	3826.75
	June	232010.85	4547.41	200584.18	3931.45	3931.45
	July	178718.15	3502.88	180654.08	3540.82	3540.82
	August	236284.94	4631.18	210331.63	4122.50	4122.50
	September	189668.24	3717.50	157139.28	3079.93	3079.93
	October	213361.14	4181.88	181688.77	3561.10	3561.10
	November	185553.83	3636.85	157237.24	3081.85	3081.85
	December	183594.29	3598.45	149655.10	2933.24	2933.24
1944	January	216673.12	4246.81	196071.42	3843.00	3843.00
	February	193946.24	3801.34	155764.79	3052.99	3052.99
	March	193887.19	3800.19	160193.87	3139.80	3139.80
	April	143371.77	2810.09	135959.69	2664.81	2664.81
	May	151983.24	2978.87	114800.00	2250.08	2250.08
	June	170977.07	3351.15	124881.63	2447.68	2447.68
	July	155042.51	3038.83	127266.32	2494.42	2494.42
	August	160230.04	3140.51	133720.91	2620.93	2620.93
	September	145380.19	2849.45	113443.36	2223.49	2223.49
	October	39077.50	569.92			
	November		507.89			
					$100692.01	$100692.01

[fol. 32] Schedule C

Copies of monthly tax returns and cancelled checks evidencing payment of the tax monthly. To establish customer refunds, ledger cards have been checked to ascertain that items listed in customer's claim were charged on Norton Company invoice. Customer's debit memorandums and copies of credit memorandums issued to the customers by Norton Company for tax refunded have been retained.

Schedule B

Norton Company is a Massachusetts corporation licensed to do business as a foreign corporation in Illinois. The main office and plant is located at Worcester, Massachusetts. Norton Company manufactures and sells grinding machines and abrasive products. Branch office and warehouse is located at 4737 South Turner Avenue, Chicago 32, Illinois.

Norton Company has paid to the State of Illinois a tax on *all* retail sales to Illinois customers to and including the month of September 1944. Until May 1942 the amount of this tax was charged to and collected from the customer as additional expense on account of the Illinois Retailers' Occupation Tax. In May 1942 the practice of charging over the amount of the tax on grinding wheels was discontinued and the tax absorbed by the Norton Company; charging over and collection from the customer of the amount of the tax on grinding machines, however, was continued.

This claim therefore includes the amount of tax paid by Norton Company represented by customers' claims for refunds which have been unconditionally honored and paid by [fol. 33] Norton Company plus amounts paid since May 1942 which no attempt was made to collect from the customer.

Norton's retail sales in Illinois are of two classes:

1. Sales from stock maintained in the Chicago warehouse for customers' convenience. Receipts from these sales it is conceded are taxable.

2. Sales in interstate commerce delivered f. o. b. Worcester, Massachusetts. No Norton representative in Illinois has authority to accept an order or conclude a contract of sale for products to be delivered from Worcester, Massachusetts. In all such cases all orders are accepted, all con-

tracts concluded at Worcester, Massachusetts, and all invoicing is from said Worcester.

It is on these Class 2 sales only that this claim is based.

Dept's. Ex. No. 3, notice of determination.

Dept's. Ex. No. 4, return receipts.

Dept's. Ex. 5, letter from Norton Company to Department of Revenue protesting tentative denial of claim for credit.

Dept's. Ex. 6, letter of Norton Company to Department, advising it retained Hansen & Towle as its attorneys, to represent it in the matter of its claim for credit.

Dept's. Ex. 7, notice of hearing on claim.

Dept's. Ex. 8, return receipts.

Dept's. Ex. 9, audit of books and records of Norton Co. made by Department, contains figures not important except classification of sales made by department, as follows:

[fol. 34] Month of July 1944

Class		Page	
a	Machinery & Equipment sales—Tax added to Invoice	13	$14,930.47
b	)Sales shipped into Illinois for Chicago Store	15	34,728.48
	)Sales shipped to Chgo. c/o Chicago store	20	38,872.36
C	)Shipped into Illinois Freight Express Prepaid	21	21,974.63
	)Shipped into Chgo.	23	16,797.52
E	)Shipped into Ill. F. O. B. Worcester	24	2,154.92
	)Shipped into Chgo. F. O. B. Worcester	25	683.05
g	)Parcel Post from Worcester into Ill.	26	892.66
	)Parcel Post from Worcester into Chgo.	27	2,579.17
f	)F. O. B. Worcester into Illinois Tax Added to Inv.	28	959.78
	)F. O. B. Worcester into Chgo. Tax Added to Inv.	29	904.02
d	)Illinois Sales c/o Chicago store Tax added to Inv.	30	952.23
	)Chgo. Sales c/o Chicago store Tax added to Inv.	31	2,343.64
h	Chicago Warehouse sales	32	16,269.58
	Total Taxable Sales Reported		$155,042.51

Form of order of Norton Company used for machinery and equipment sales only, provides that it is subject to acceptance in writing by the Norton Company at its main office, Worcester, Massachusetts, and provides that delivery shall be f. o. b. cars Worcester 6, Massachusetts.

Letter from Norton Co. agreeing that the sales for July 1944, shall be applied to the sales for the entire claim period.

NORTON CO. EXHIBIT NO. 1.

Norton Co. Ex. 1 shows the tax absorbed by the Norton Company on Worcester wheel shipments for the period from May 1942 to September 1944, in the total sum of $91,560.34

and the total wheels sales of $4,671,445.92, which exhibit is as follows:

[fol. 35] Memorandum from Business Analysis Department

Subject Tax Absorbed on Worcester Wheel Shipments—May 1942-Sept. 1944

1942	May	$ 2,285.04
	June	2,784.35
	July	3,118.53
	August	3,681.46
	September	3,355.03
	October	3,567.73
	November	3,683.52
	December	3,043.87
1943	January	3,540.48
	February	2,984.37
	March	3,645.27
	April	3,267.40
	May	3,797.76
	June	3,905.84
	July	3,494.98
	August	4,121.03
	September	3,070.86
	October	3,559.12
	November	3,081.85
	December	2,932.28
1944	January	3,841.21
	February	3,046.72
	March	3,139.79
	April	2,656.96
	May	2,249.22
	June	2,447.18
	July	2,455.62
	August	2,579.38
	September	2,223.49
	Grand Total	$91,560.34
	Total Wheel Sales	$4,671,445.92

[fol. 36] Norton Ex. 2, form of acknowledgment of order sent from Worcester to customer.

Norton Ex. 3 is a form of corrected acknowledgment of orders sent from Worcester to customer.

Norton Ex. 4 is a form of corrected acknowledgment of order sent from Worcester to customer.

Norton Ex. 5 is a form of acknowledgment of order and estimate of shipping date sent from Worcester to customer.

Norton Ex. 6, form of order used for machines.

Norton Ex. 7, form of invoice sent to customers, showing shipment f. o. b. Worcester.

Norton Ex. 8, form of invoice sent from Worcester, showing goods shipped f. o. b. Worcester.

Norton Ex. 9, form of invoice sent from Worcester, showing shipment f. o. b. Worcester.

Norton Ex. 10, form of invoice sent to its customers, showing goods shipped f. o. b. Worcester.

Norton Ex. 11, order of The Ingersoll Milling Machine Company, addressed to the Norton Company at Chicago, directing shipment by parcel post, stamped "Received at Chicago September 15, 1942", and "Received at Worcester, September 16, 1942", directing shipment by parcel post or express to Rockford, Illinois.

Sheet No. 2 of Ex. 11, consisting of a parts order blank, showing the items ordered and the price, shipping instructions by parcel post.

Sheet No. 3 of Ex. 11, invoice sent from Worcester, showing shipment parcel post, f. o. b. Worcester.

Ex. 12, order from Continental Bridge Company, Peotone, Illinois, addressed to Norton Company at Worcester, di-[fol. 37] recting shipment of items by parcel post, received at Worcester June 21, 1943, acknowledged June 22, 1943, from Worcester.

Sheet No. 2 of Ex. 12 is an acknowledgment, sent from Worcester to the purchaser at Peotone, acknowledging order and giving date of shipment.

Sheet No. 3, copy of invoice sent from Worcester to Peotone, showing items shipped by parcel post, f.o.b. Worcester.

Norton Ex. 13, order from C. S. Johnson Co., Champaign, Illinois, addressed to the company at Worcester, showing receipt and acknowledgment at Worcester.

The second sheet consists of an acknowledgment sent from Worcester to purchaser showing date of shipment.

Sheet No. 8, manufacturing check prepared at Worcester, showing how the item was to be manufactured and shipped and the formula and mixing and instructions to the grading and inspecting department, etc.

Manufacturing record, prepared at Worcester, Massachusetts.

Copy of invoice sent from Worcester to C. S. Johnson Company, at Champaign, showing the shipment by railway express f.o.b. Worcester.

Additional invoice showing shipment f.o.b. Worcester.

Norton Ex. 14, purchase order of the Buick Mofor Division of General Motors Corporation, addressed to Norton, Worcester, showing receipt at Worcester May 25, 1944.

Manufacturing check prepared at Worcester, showing [fol. 38] items were to be shipped to Norton, Chicago, for purchaser.

Acknowledgment, sent form Worcester to purchaser, showing date of expected shipment.

Invoice of Norton at Worcester to Buick showing items sent f.o.b. Worcester 6, care Chicago store.

Ex. 15, purchase order of Kraut & Dohnal, Chicago, addressed to Company at Worcester, received and acknowledged at Worcester.

Manufacturing check prepared at Worcester, directing shipment made care of Chicago store.

Manufacturing record prepared at Worcester.

Acknowledgment to Kraut & Dohnal, indicating date of shipment.

Invoice to Kraut & Dohnal, showing items ordered shipped f.o.b. Worcester, care of Chicago store.

Norton Ex. 16, purchase order of the University of Chicago, addressed to the Norton Company at Chicago, received at Chicago June 5, 1944, received at Worcester June 7, 1944, by airmail.

Manufacturing check prepared at Worcester, directing the shipment to purchaser.

Manufacturing check prepared at Worcester, directing articles to be shipped to purchaser by parcel post.

Acknowledgment of order at Worcester to the purchaser showing date of shipment.

Invoice to University of Chicago, showing item shipped f.o.b. Worcester, by parcel post.

Norton Ex. 17, purchase order of American Car and Foundry Company, Madison, Illinois, addressed to Norton

at Worcester, received at Worcester June 23, acknowledged June 26th.

[fol. 39] Invoice to American Car from Worcester, showing items shipped freight paid f.o.b. Worcester.

Manufacturing check prepared at Worcester.

Manufacturing record prepared at Worcester.

Norton Ex. 18, order of the Standard Lime and Stone Company of Baltimore, Maryland, addressed to Norton at Worcester for shipment to purchaser at McCook, Illinois, received and acknowledged from Worcester.

Manufacturing check prepared at Worcester showing date to be shipped, shipped by railway express from Worcester.

Manufacturing record prepared at Worcester.

Statement to Standard Lime showing items shipped to McCook, Illinois, express paid f.o.b. Worcester.

Ex. 19, order of Charter Gas Engine Works, Sterling, Illinois, addressed to Norton, Worcester, received and acknowledged at Worcester.

Manufacturing check and record prepared at Worcester.

Invoice from Worcester, showing items shipped by parcel post, Worcester.

Ex. 20, purchase order of Butler Manufacturing Company, addressed to Norton at Worcester, received by air-mail, acknowledged.

Instructions by Butler Company, concerning order.

Acknowledgment of order from Worcester.

Manufacturing check prepared at Worcester, directing shipment to the customer via the Norton Company, Chicago.

[fol. 40] Manufacturing record prepared at Worcester.

Invoice to customer showing shipment care of Chicago store, f.o.b. Worcester 6, Massachusetts.

Norton Ex. 21, purchase order from Greenlee Bros. & Co., Rockford, Illinois, addressed to Norton at Chicago, received at Worcester February 13, 1944.

Second sheet of order.

Abstracts of order prepared at Worcester.

Invoice to Greenlee Bros., from Worcester, showing shipment by freight, f.o.b. Worcester.

Norton Ex. 22, order of AT&SF Ry. Co., addressed to Norton at Worcester, acknowledged from Worcester.

Manufacturing check prepared at Worcester.

Manufacturing record prepared at Worcester.

Acknowledgment of order from Worcester, showing shipping date.

Invoice sent from Worcester, showing date shipped and shipped by freight from Worcester, f.o.b. Worcester.

Norton Ex. 23, purchase order of Fansteel Metallurgical Corporation, North Chicago, addressed to Norton at Chicago, received, at Chicago, received at Worcester, June 20, 1944.

Telegram concerning order from Worcester.

Incoming telegram concerning order.

Invoice sent from Worcester to purchaser, showing shipment by express, f.o.b. Worcester.

Norton Ex. 24, order of Brown Machine Company, Grayville, Illinois, addressed to the Norton Company at Worcester, received March 23, 1944, acknowledg from Worcester March 24, 1944.

[fol. 41] Acknowledgment of order sent from Worcester showing shipping date.

Manufacturing check prepared at Worcester.

Manufacturing record prepared at Worcester.

Invoice sent from Worcester to purchaser showing shipment care of Chicago store, f.o.b. Worcester, c.o.d. from Chicago.

Norton Ex. 25, purchase order of Forster Brothers, Melrose Park, Illinois, addressed to the Norton Company at Worcester, received by air mail.

Acknowledgment of order sent from Worcester.

Invoice to customer from Worcester showing shipment by parcel post, f.o.b. Worcester 6.

Manufacturing check prepared at Worcester.

Manufacturing record prepared at Worcester.

Norton Ex. 26, purchase order of Automotive Maintenance Machinery Co., addressed to the Norton Company at Worcester, Massachusetts.

Abstract of order prepared at Worcester.

Transcription of order prepared at Worcester.

Abstracts of order prepared at Worcester.

Invoice to Automotive Maintenance Machinery Co., North Chicago, from Worcester 6, showing shipment by freight f.o.b. Worcester 6.

Ex. 27, order of John Oster Manufacturing Co., Genoa, Illinois, addressed to Norton, Worcester, received April 19, 1943, acknowledged from Worcester.

Abstracts of order prepared at Worcester.

Original telegram concerning order.

Invoice from Worcester to John Oster at Genoa, show-
[fol. 42] ing shipment by freight, f.o.b. Worcester 6, all Norton exhibits admitted in evidence.

Certification by stenographer that the foregoing are true and correct copies of the proceedings of the hearings.

E. E. McConnell, recalled as a witness testified on cross-examination.

In preparing our claim for credit for the period in question, we did not include class D or B sales because they are probably not grinding wheel sales; if they were grinding wheel sales they would be included; we did not include in our claim for credit class A sales, for which there was no refund of Retailers' Occupation Tax; Mr. Walston, manager of Chicago office, has privilege of accepting a purchase order from customer who is on approved credit list, provided merchandise is on hand in Chicago warehouse; Walston does not have right to reject an order from a customer on the approved list, even though merchandise is in Chicago office; Walston has no discretion in the acceptance or rejection of an order; the order is forwarded to Worcester for *ac-* acceptance or rejection; if an order comes into Chicago office, he has no discretion in event Worcester informs him it is an approved customer; Walston sends bills only for merchandise sold out of Chicago warehouse for stock on hand at Chicago; in case of order received at Chicago for merchandise partly on hand, the balance of the order for the merchandise not on hand would be shipped to Worcester for completion; if the goods were shipped from Worcester, it would be a Worcester sale regardless of the fact that it may be considered a stock item in Chicago; [fol. 43] all our terms on sales are f.o.b. Worcester; some of the orders are for parcel post, railway express and others are shipped in other fashions; when the transportation agencies sign a receipt for merchandise they are given to us at Worcester; in class B sales for merchandise, bill of lading would cover the entire car; freight receipt is received at Worcester; Chicago office would have on hand typical schedules of merchandise that was listed for the Worcester office in connection with the carload lots; the list sent to Chicago office indicates manner in which they are to transship from the Chicago office; in connection with the ship-

ments from the Chicago office to the customer, after the car is brought to Chicago and the bulk is broken, the Chicago office would also have the various types of shipping receipts and postal receipts; some of the parcel post packages are insured; Chicago has some indication of the method of shipment from Chicago.

E. E. McConnell on re-direct testified as follows:

All our invoices on our sales show how merchandise is shipped from Worcester; they show merchandise is shipped f.o.b. Worcester, Massachusetts; some of the invoices in addition may show the goods are sent by parcel post, f.o.b. Worcester; some of them may show railway express f.o.b. Worcester; some of them may show they are shipped in carload lots to be redistributed through the Chicago store, f.o.b. Worcester; with reference to a so-called split order, which is an order that may contain a request for merchandise part of which is not on hand, Chicago office does not have any authority to accept or reject any order [fol. 44] with respect to merchandise which it doesn't have; those sales are in the vast minority; if the Chicago office would receive an order that could be partly filled, with respect to the balance of the order, it was forwarded to Worcester for acceptance or rejection; it is not merely for completion; Chicago office does not have any information concerning what inventory Worcester may have on hand; Chicago office does not have information as to what Worcester can or cannot manufacture; Chicago does not have any information or know what the Worcester manufacturing problems are with regard to priorities; during the period of the claim Worcester office maintained what is known as a Priority Board; that is in the Machine Division; nobody, except those people at Worcester knew what merchandise could be manufactured or when it could be shipped; that was known only by the Order Board Machine Division; it was known only to the people in Worcester; Chicago office, under no circumstances could give a shipping date when an order would be sent from Worcester.

Dept's. Ex. 10, letter of authority to Harry S. Stark, to conduct hearing, admitted in evidence.

LOUIS J. KLINGMAN, witness for Department, testified as follows:

I am field auditor of the department; I made the original audit previously admitted as Ex. 9; since the last hearing I went to Worcester to make an analysis of wheel sales, concerning Taxpayer's Ex. 1; after verifying Taxpayer's Ex. 1 as to correctness of wheel sales, we proceeded to make an analysis as to taxpayer's wheel sales based on a test-check of 5 months, which were November [fol. 45] 1942, February 1943, December 1943, March 1944 and July 1944; this was acceptable to the taxpayer as a test check; we then broke the figures down as to the various different categories of the sales which were outlined in the first audit as B sales, G sales, C and E; the percentages arrived at for wheel sales shipped from Worcester in care of the Chicago stores to Chicago and Illinois customers, were 54.51%; those were shipments of wheel sales from Worcester to Chicago care of Chicago stores; by Chicago stores, I mean the Chicago office and warehouse; the next category was wheel sales shipped from Worcester direct to the Chicago and Illinois customers by freight and express, parcel post, prepaid, with no additional charge; the percentage of these sales were 42.27%; those were prepaid shipments; the next category is wheels shipped from Worcester direct to Chicago and Illinois customers by freight and express collect and parcel post charges added to invoice, percentages amounted to 3.22%; using these percentages on the total of wheel sales shown in Taxpayer's Ex. 1, the total amount in dollars and cents in category 1 is $49,909.54, category 2, $38,702.56, category 3 would be $2,948.24, making a total of $91,560.34, which amount is represented in the footing of taxpayers' Ex. 1, and which represents the tax upon all wheel sales in Illinois, rather than the receipts for sale; we verified the taxpayer's exhibits originally presented at the first hearing, which are numbers 11 to 27; we made a further analysis of their exhibits numbers 11 to 27 and prepared work sheets and got other data in connection with the analysis from the records furnished by the company; reading from page A-74 and 5, which is taxpayer's Ex. 11, we verified the shipment made [fol. 46] by taxpayer by ordinary parcel post with no records available showing the shipment; R.O.T. added to original invoice; taxpayer's Ex. 12, verification shows this

item shipped by ordinary parcel post and no records available showing shipment; taxpayer's Ex. 13, verification of these items shipped by express collect and verified with waybill; we made an analysis of taxpayer's Ex. 11 through 27 for the purpose of determining two facts: the method of shipment and destination; taxpayer's Ex. 11 was shipped by parcel post from Worcester to Chicago with R.O.T added to invoice; we were not able to determine where the credit was okay'ed on that order in view of the fact that the R.O.T had been added to it, we just eliminated it; R.O.T. had been added to Ex. 12; was shipped by parcel post from Worcester to Chicago, to the customer, rather; Ex. 13 was a shipment by express, verified with the waybill sent to the customer; that was shipped from Worcester express collect; Taxpayer's Ex. 14 and 15, these items were shipped care of Chicago; we have the photostatic copy of carload shipment consigned to Chicago stores attached showing these items; we have the photostatic copy of the original bill of lading and copy of the number of packages shipped on that particular carload, showing each customer's name and address; in connection with that particular carload shipment, we also found there was a claim for damages filed by Norton Company against the railroad company for a breakage of merchandise; Ex. 11A consists of 13 items bearing a number in the upper right hand corner, referring to pages A76 through A87; Taxpayer's Ex. 14 and 15, in addition to the explanation shown, we made photostatic [fol. 47] copies of the original carload shipment, care of Chicago stores, consigned to Chicago stores, pages A76 to A84, inclusive, also photostatic copy of the original bill of lading marked, A85; photostatic copies, pages 86 and 87 is a copy of an original freight bill of lading, for which taxpayer filed damages against the railroad company for breakage of merchandise as further evidence of taxpayer's Ex. 17, we made photostatic copies of the bill of lading and freight bill showing freight had been prepaid and nothing on the bill of lading to show shipment was made f.o.b. Worcester; purchase order shows merchandise to be shipped f.o.b., destination; Department's Ex. 12, pages A1 to A73 contains a complete analysis based on a test check of the taxpayer's wheel sales on which taxes of $91,560.34 were paid, as shown in their original Ex. 1; we made an analysis of five months as a test check and applied the percentages to the various different categories against the

tax on wheel sales, which were paid by the taxpayer and which the taxpayer bore the burden of same; these categories broken down are total wheel sales shipped from Worcester, care of Chicago stores and Illinois customers; the percentage of these wheel sales, per analysis, was 54.51% of the total taxes of $91,560.34, making a tax on wheel sales based on a percentage for these shipments of $49,909.54; the second category is wheel sales shipped from Worcester direct to Chicago customers by freight and express, parcel post, prepaid with no additional charges to their Chicago and Illinois customers as stated in the previous paragraph, the percentage test check was made on the same basis; the percentage of these sales was 42.72% applied to the total wheel sales taxes of $91,560.34 leaving [fol. 48] a total of $38,702.56; I am not referring to the amount of sales but to the amount of tax; those should be taxable wheel sales; the third category was computed in the same way that the two preceding paragraphs and these sales were sales shipped from Worcester direct to Chicago and Illinois customers by freight and express collect and parcel post added to invoices and the percentage of these were 3.22% of the tax on wheel sales of $91,560.34, giving a total of $2,948.24; this analysis is shown on pages A1 and A2; pages A3 to A73 inclusive, show the analysis of the test check of the various five months used on the test check basis; this test check was in agreement with the taxpayer; I had Harold Hirsh, field auditor, assist me in the audit; he helped prepare Ex. 12; in the audit, where we use the language, "Total Chicago Wheel Sales", "total Chicago and Illinois Wheel Sales", "Total Wheel Sales to Illinois Customers", "Total Chicago Wheel Sales", we mean that those are "Total Wheel Sales shipped to Chicago and Illinois customers; on lines 1, 2, 3 to 10 on page A18, where it shows total Chicago wheel sales, 65,986.74, by that language we refer to sales made which were billed and shipped from Worcester to Chicago and Illinois customers; on page A33, where we refer to "total Chicago wheel sales" and "total Illinois wheel sales", we are referring to total wheel sales to Chicago customers and total wheel sales to Illinois customers; referring to page A48, where we used the language "total Chicago wheel sales", "total Illinois wheel sales", we mean total wheel sales in Chicago of customers located in Chicago, and total wheel sales located in Illinois outside of Chicago, shipped from

Worcester; throughout the exhibit where we use the same language "total Chicago wheel sales", and "total Illinois [fol. 49] wheel sales", we mean the total wheel sales to Chicago customers and total wheel sales to Illinois customers outside of Chicago;

Department's Ex. 12 admitted in evidence.

I made a further analysis of certain carload shipments taken at random for the month of July 1944.

Department's Group Ex. 13, consisting of photostatic copies of bills of lading, invoices and other papers.

In addition to the taxpayer's exhibits that were verified, we made an additional verification of orders received by the Norton Company at its Worcester Plant by taking at random the carload lot shipment and picking out a number of orders that were included in this carload shipment and shipped care of Chicago stores, to get at the original order as to where it was received, whether at Chicago or at Worcester direct. How it was billed, whether it was shipped, care of the Chicago store, etc. After making a list, which is shown in Group "O", we listed the order number and an explanation of each one of these order numbers, as for example, Order Number 952332, received and billed at Worcester, shipped care of Chicago store; Order Number 964290, received, checked and okayed for credit at Chicago, forwarded to Worcester for billing of order and reshipped, care of Chicago; Order Number 94759, the same procedure as above Order Number 964290. This Order Number 969588 and Order Number 959324 is also the same procedure as explained in Order Number 964290; Order Number 995399, order received and billed at Worcester and shipped, care of Chicago store. This also applied to Order Number 900742. Order Number 944417, order received and checked at Chicago, forwarded [fol. 50] to Worcester for filling of order and reshipped, care of Chicago store. Order Number 987229, order received and billed at Worcester, shipped care of Chicago store; Order Number 947479, order received, checked and okayed for credit at Chicago store, forwarded to Worcester for filling of order and reshipped, care of Chicago store. Order Number 949223, same procedure as Order Number 944417; Order Number 958353, order received and billed

at Worcester, shipped care of Chicago store; Order Number 201053, Order Number 958338 and Order Number 964144, same procedure as Order Number 944417; Order Number 200381, order received and billed Worcester, shipped care of Chicago store; Order Number 978783, same procedure as Order Number 944417; Order Number 964937, order received and billed Worcester, shipped care of Chicago store. Photostatic copy of the original bill of lading is marked prepaid and photostatic copy of the Traffic Department's list of shipments, on which the above items have been checked. In checking off these individual orders, we have made a photostatic copy of the Taxpayer's invoice, Taxpayer's acknowledgment, Taxpayer's order check and original copy of customer's invoice. Where the testimony is given as to order received, checked and okayed for credit at Chicago store before forwarding to the home office, there is a Chicago order number placed on the customer's invoice showing that the order was originally received at Chicago and also a stamp, stamped by the Chicago office showing that the order had been checked off and the date and credit okayed by the Chicago office; when an order is received at the Chicago stores, it is given a Chicago Order Number, and then it is stamped and checked for price and terms and okayed for credit. [fol. 51] It is then also checked with the Chicago Warehouse merchandise stock to see whether or not they can fill the order from their stock. If unable to fill from Chicago stock, the order is forwarded to Worcester for fulfillment of order. Some of these orders are split orders, where the order is originally received in Chicago and partly filled from Chicago stock and forwarded on to Worcester for balance of shipment. This information was given to me by Mr. Firberg, who is in charge of the Order Department at the home office at Worcester.

Ex. 13 offered in evidence, subject to following objections:

Mr. Towle: Yes, these objections pertain to the conclusions of Mr. Klingman, contained on the first sheet, which is marked group "O". Mr. Klingman attempts to identify certain orders as to where the orders were shipped. They are merely conclusions of his and are not statements of fact, particularly when he says Order Number 964290

was received, checked, and okayed for credit at Chicago. That is a conclusion, that is not borne out by the orders attached, and he also continues on further and says that the order was forwarded to Worcester for filling of order, that's a conclusion of the witness, and throughout this page marked, Group "O", you will find additional conclusions of Mr. Klingman. I have no objections on the admission of the orders themselves, and will introduce them into evidence to show how the Company did business, but as to his conclusion, I say this should not be admitted at all.

Dept's. Ex. 10, authority to Stark to conduct hearings.

[fol. 52] Department's Ex. 11A, consisting of two sheets, bearing letters A74 and A75, respectively, concerning methods of shipment of orders admitted in evidence by taxpayer.

Dept's. Ex. 11B, list of shipment of July 1, 1944 from Worcester, showing merchandise sent and names of customers.

Bill of lading.

Original freight bill.

Letter of Norton Company concerning claim for $7.25 damage to containers of April 30, 1946.

Uniform bill of lading.

Uniform bill of lading.

Dept's. Ex. 12.

Prepaid freight bill.

Computation of tax on wheels, contains figures not important for the determination of the issues herein.

Ex. 13, consisting of forms of orders, manufacturing checks, acknowledgments of orders and invoices furnished the Department to show how orders are accepted in Worcester; orders acknowledged from Worcester, goods manufactured at Worcester, goods shipped from Worcester and invoices sent from Worcester, f.o.b. Worcester; forms were furnished by Norton Company to Department to show how Norton conducted its business.

Certification by stenographer that copy of proceedings are true.

[fol. 53] Louis J. Klingman, called as a witness of Department, testified as follows:

Group P consists of a list of orders, invoices, etc., which were picked at random from carload shipment of July 31,

1944, and an analysis made of each exhibit; order 965213 received, checked and okayed for credit at Chicago office, forwarded to Worcester for filling and shipped care of Chicago store; order 980062, order received and billed at Worcester, shipped in care of Chicago store; order number 990484 received and billed at Worcester, shipped in care of Chicago store, order 217094, same procedure as order 965213; these orders were received at Chicago, okayed for credit and forwarded on to Worcester; orders 995815, 208952, 924492, 906181, 225928, same procedure as order 965213; orders 961666 and 984754 were orders received and shipped from Worcester in care of Chicago store; I also have a photostatic copy of an original bill of lading, marked prepaid, and a photostatic copy of traffic department list of shipment on which the above items were listed and checked; these orders were received at Chicago and are given a Chicago order number; starting with order 965213, order was received from Borg & Beck, dated June 14, 1944, received at Chicago June 15, 1944, forwarded and received at Worcester June 19th; okayed at Chicago June 15, 1944; next order, 980662 is a copy forwarded to Worcester for fulfillment; there is no stamp on this showing date it was received and okayed at Chicago; however the order was received at Worcester June 22, 1944; order 990484 was an order made by Chicago office for O. D. Jennings Com-[fol. 54] pany and forwarded to Worcester for fulfillment.

Mr. Towle: I object to the use of the conclusion referring to this order and other orders, where witness says it was sent to Worcester for fulfillment. That is a conclusion and is not borne out by the exhibit.

(Witness resuming) When an order is received and filled at the Chicago office, the billing is made at Chicago office and not forwarded to Worcester. The only time an order is forwarded to Worcester is when they don't have the material in stock and it is forwarded to Worcester for the filling of the order and billing.

Mr. Towle: I object to the statement; it is a conclusion of the witness and the orders heretofore identified do not so indicate that they were sent for fulfillment.

(Witness resuming) Order 217094 from General Machinery & Manufacturing Company, Chicago, received at Chicago July 19th, stamped at Chicago July 19, 1944 and forwarded to Worcester and received at Worcester July 21;

I am referring to the stamp okay for credit and price, etc. The stamp made by Chicago office shows the check marks as to receipt and also shows initials as being okay for credit; these are wheel sales; correction, they are abrasives; order 995815 order from American Steel & Wire Company, received and stamped by Chicago office and okayed July 13, 1944; received at Worcester July 17, 1944; order 208952 from Klipfel Manufacturing Company, received and stamped and okayed at Chicago July 13, 1944; received at Worcester July 17, 1944; order number 924492, [fol. 55] from International Harvester Company, dated May 19, 1944, received at Chicago office, stamped and okayed May 20, 1944, received at Norton Company, Worcester, May 23, 1944; order number 906181, from Henry Disston & Sons, Inc., dated May 6, 1944, received at Chicago office, stamped and okayed on May 9, 1944, received at Worcester office May 12, 1944; order number 961666, order made by Chicago office, forwarded to Worcester and received at Worcester July 12, 1944; order 225928, order blank presumably made by the Chicago office per Continental Can Company, Chicago, received, dated and stamped July 24, 1944; received at Worcester July 26, 1944; order 98754, Chicago office order forwarded to Worcester June 28, 1944; this Group P is a carload shipment taken at random July 31, 1944, checked off on the list made out by the Traffic Department of Norton Company of Chicago, which is attached to this group; Department's Exhibits marked Group R is a further analysis of the orders and bills of lading and is a list of invoices, orders, etc. which were shipped freight prepaid and picked at random from files showing complete transactions and analysis of each; July 3rd, order received in Chicago, sent to Worcester for completion.

Mr. Towle: I object to the conclusion of the witness as to the purpose for which the order was sent to Worcester; the exhibit speaks for itself in that regard.

(Witness resuming). Credit okayed in Chicago.

Mr. Towle: I object to the conclusion that the credit is okayed.

Mr. Stark: Are you reading from the Exhibit, Mr. Klingman?

[fol. 56] Ans.: I was reading from my comments and I checked and verified it with the exhibits; July 3, 1944, number 943466, purchase order from American Steel Foundries received, dated and okayed at Chicago May 27, 1944; okayed is for credit as shown by the signature underneath the stamped credit thereto; it was okayed for credit at Chicago; received at Worcester June 2, 1944; July 5, 1944, order received at Chicago, sent to Worcester for completion; credit okayed in Chicago; purchase order from the American Machine and Metals, Inc.; order 92[illegible]605, purchase order of American Machine and Metals Company, East Moline, Illinois, dated May 26, 1944, received at Worcester May 29th, 1944; July 6, 1944, order 910612, purchase order of Caterpillar Tractor Company at Peoria, received at Chicago; checked off and okayed for credit on May 12th; received at Worcester May 15th; July 6, 1944, order 904493, same procedure as July 3, 1944, number 943466; purchase order received from International Harvester, Rock Island, Illinois; checked off, received, okayed and stamped at Chicago office on May 4, 1944; received at Worcester; referring to order number 904493, received at Worcester May 8, 1944; July 7, 1944, order 904042, same procedure as July 3, 1944, order 943466, purchase order from the American Brake Shoe Company dated May 4, 1944, and received, checked off and okayed and stamped at Chicago office May 5, 1944; received at Worcester May 10, 1944; July 7, 1944, order number 954035, same procedure as July 3, 1944, order 943466; purchase order received from David Bradley Manufacturing Works, Bradley, Illinois; order dated June 6, 1944, stamped, received, checked and okayed for credit at Chicago office in [fol. 57] June, 1944; received at Norton Company, Worcester, June 12, 1944; July 15, 1944, order 969542, order made by Chicago office, forwarded to Worcester, received June 24, 1944; July 19, 1944, order 940192, order written up by Chicago office, forwarded to Worcester; received at Worcester June 1, 1944; same procedure as July 3, 1944, 943466; that also applies against orders 940192 and 969542; July 20, order 978554, same procedure as July 3, 1944, order 943466; order written up by Chicago office, forwarded to Worcester; received at Worcester June 26, 1944; on order 978554, item 2 was shipped from Chicago stock and items 1 and 3 were shipped from Worcester, that completes Group R; for the purpose of making a further check of Illinois sales, an agreement was had between Mr. Pilsworth and George Fyrberg,

superintendent of the order service of taxpayer company that we would take one day's orders coming in from Illinois and have it checked and analyzed; it was agreed by Mr. Pilsworth that it would be representative of Illinois sales and might be used as a measure for all of the Illinois sales covered in taxpayer's claim for credit; a letter was so given; the letter is dated May 2.

Letter admitted in evidence as Department's Ex. S-1.

That letter excludes orders received on machinery and equipment and resales which were not involved in the question of tax; we used April 30, 1946, for the one day's business; these orders were handed to me by Mr. Fyrberg, superintendent of order service; we picked these orders out because they were wheel sales and emery wheel sales and did not include machinery and resales; just the sales pertaining to the claim for credit were used; machinery sales and [fol. 58] wheel sales were eliminated; there are 67 in all; we made an analysis of these orders; that analysis is contained in Group S-2, S-3 and S-4; Group S-2 consists of orders received direct at Worcester, 4 in number; Group S-3 consists of split orders, 13 in number, received at Chicago, partially filled from Chicago stock and the balance of the order filled at Worcester, Massachusetts; the original order is accepted and okayed for credit at Chicago office; Group S-2 consists of 4 orders received direct at the Worcester office; the orders in Group S-2 did not come through Chicago at all; Group S-3 and 4 were orders received originally at Chicago office and forwarded to Worcester; S-3 has 13 orders; those are split orders.

Group S-3 consists of 13 orders bearing various numbers, either on the order blank of the purchaser or prepared by the Chicago office for the customer; they are all stamped and okayed for credit and forwarded to Worcester; these orders bear numbers 64347, 52720, 64244, 64353, 67424, 64487, 63771, 66343, 64892, 63740, 64283, 64833 and 63362.

Order 65349 is an order blank made at Chicago office, stamped, checked and okayed for credit on April 22, 1946, forwarded to Worcester and received at Worcester office April 24, 1946; on the back of the order I made a notation which was given me by Mr. Fyrberg, "Phone call from Chicago, credit approved at Chicago, shipped from Chicago"; one of the items shown on order 65349 was shipped from Chicago.

Group S-4 consists of 50 orders, all of them bearing various numbers which are not important; the orders were either on order blanks made at Chicago, stamped, received and [fol. 59] checked, okayed and forwarded to Worcester, or they were on order forms of the various Illinois purchasers; the orders were all received at Chicago, stamped, checked, okayed for credit and forwarded to Worcester.

The names of the 50 customers, dates the orders were received at Chicago or received at Worcester contribute nothing to the problem involved herein and to save space, have been omitted from this abstract.

I had a conversation with Mr. Fyrberg, who is the superintendent of order service at Worcester main office; we talked with him at the time we were at the home office of the taxpayer; we had a conversation relative to the method of handling sales originating in Illinois; part of the conversation was held May 2, 1946; Harold Hirsh, who assisted me in the audit, was present besides myself and Mr. Fyrberg; we asked Mr. Fyrberg to give us a complete outline of how the general run of business was done by their office and to outline how he received his orders and any other information he could give us along these lines; he explained to us that when an order is received at Chicago, the Chicago office gives it a purchase order number; then they stamp it, check it for price, etc., and okay the account for credit at Chicago office; then, if they are unable to fill the orders at Chicago, they forward it on to Worcester and Worcester completes the order, the unfilled portion of it is a split order or the balance of the order originally sent in; this procedure was confirmed by our examination of this one day's business to which I just testified; so that out of 67 orders for abrasive materials that I checked, which was all of that day's business of April 30, 1946, four out of the 67 were sent direct to the [fol. 60] home office of the taxpayer from the purchasers and 63 were received by the home office from the Chicago office after this procedure had been gone through; these orders did not include resales or sales of machinery or equipment.

Group Ex. P, Group R, Group Ex. S-1, S-2, S-3 and S-4 admitted in evidence.

Group S-5, consisting of 7 documents are confirmations of teletype of order blanks written at Chicago office which

were sent to Worcester office for filling of orders; these are order blanks made out by Chicago office; this is a confirmation of order blanks made out from Chicago office and teletyped to Worcester.

Objection that first sheet of Group P, contains conclusions of Mr. Klingman and are not borne out by any facts disclosed by the exhibits referred to; they are conclusions of the witness; same for Group R, Group S, S-2, S-3, S-4, S-5.

Dept's Ex. Group P, R, S, S-1, S-2, S-3, S-4 and S-5 admitted in evidence.

Taking the direct orders received at Worcester, for that one day's business, based on the 67 orders it would be six tenths of 1% of the orders so received were received direct at Worcester and not at Chicago office; so that out of 67 orders, 99.4% were received directly from Chicago; they were received at Chicago first and then forwarded to Worcester; Mr. Fyrberg agreed to the classification made; we talked to Mr. Fyrberg relative to the method of grouping these different orders and came to an agreement on the method of grouping; Mr. Fyrberg picked out these orders for that day and we sorted them out according to groups so that it could be easily identified, so he could give us the [fol. 61] proper information as to how these particular orders were handled.

Harold E. Hirsch, witness for department testified:

I live at 6450 N. Bell Avenue, Chicago; I am field auditor of Department; heard Mr. Klingman's testimony relative to examination of records of Norton made at Worcester; I went along with him on that assignment; After Mr. Fyrberg gave us these 67 orders, which were representative of one day's business which is also representative of the audit period itself, he sat down and gave us the story behind each invoice as to where it was received, how it was okayed, how it was forwarded to Norton and how the orders were filled, either in Chicago or filled at the Norton Plan home office; by "here" I mean Chicago; the orders were received at Chicago, were okayed for credit and filled here where the merchandise was available and where the merchandise wasn't available was either partly filled here or else filled

in its entirely at Worcester or else filled in part here and part at Worcester; the orders were accepted in Chicago by okaying the order for credit; Mr. Fyrberg said that the order is accepted here and so indicated by the fact that it was stamped and signed okayed for credit, which resulted in acceptance here.

Cross-examination.

By Roland Towle:

Mr. Fryberg told us the Chicago office had the authority to okay the order for credit and to accept the order; he did not say Chicago had authority to accept that order only if the [fol. 62] merchandise was on hand in Chicago; I didn't understand that; nothing was said about the acceptance of an order which was limited to the merchandise being on hand at Chicago; from what he told us, we understood the merchandise was available here or available at Worcester, that it was accepted here regardless of whether it was a split order or filled in its entirety from Worcester.

Harry E. Walston, a witness for Norton testified:

I live at 1453 N. Austin Boulevard, Chicago; I am employed by the Norton Company; I have been with the taxpayer 34 years; am office manager of the Chicago office; have been such for 20 years; am familiar with the way the Norton Company does business; so the Department may know how orders are handled, I will testify as to the procedure followed by my office with respect to orders which are shown me; the first clerk to receive an order at Chicago is the mail clerk, a young girl just out of school, it's her first job; she slits open the envelope and takes out the contents; the clerk stamps the incoming mail, stamps it "received"; all incoming mail is so stamped by the clerk in the Receiving Department; when an order is received at Chicago office and stamped with the date of its receipt, that clerk has no authority whatever to accept or reject an order; the order is then delivered to our credit file where we have a young man who is 17 or 18 years old who verifies those orders against an approved credit list we have from Worcester; the credit file consists of a small card about one inch wide on which we show the customer's name and address and on which we indi-

cate whether the account has been approved by the Credit [fol. 63] Department at Worcester; the information to prepare those cards was procured from Worcester credit department; Taxpayer's Ex. 28 represents our Chicago file as to the individual customers therein named and consists of 7 cards linked together, the first concerning Abingdon Pottery, Inc., the next Advance Polishing Wheels, Inc., next Clinton Auto Parts Company, and the next Podbielniak Centrifugal Super Contracting Company; those cards are typical of all memoranda we have as to each customer with whom we do business; our credit file does not contain any information other than appears on those cards and they are typical of all credit memorandum cards and credit file cards contained in Chicago; those cards were prepared from information received from Worcester office; the clerk who examines the incoming orders is a boy 18 years old; his job is to look at these car-s to note on the order what the credit memorandum it shows.

Taxpayer's Ex. 28 offered in evidence.

Cross-Examination by Mr. Stark

We prepared these cards from information given to us by our Worcester office; the individual employed in our office is a young lady in our Billing Department; her name is Miss Kolby; she prepared those cards; she is still in our employ.

Taxpayer's Ex. 28 admitted in evidence, subject to objection.

(Witness resuming) The young man who examines those cards for credit of the customer has no authority to accept or reject an order; order 952332 of Department's Ex. 13, Group O, was originally received at Chicago; the [fol. 64] merchandise was not on hand at Chicago; when we receive an order such as that where the merchandise is not on hand at Chicago, no one at the Chicago office has authority to accept or reject that order; when the merchandise is not on hand, the order is forwarded to Worcester for their acceptance or rejection; this order was sent to Worcester by air mail; it was acknowledged from Worcester; the acknowledgment was sent directly to the customer; sheet number 2 is a copy of the acknowledgment;

the acknowledgment shows the customer's order number and the date on which each of the two items involved are expected to be shipped; when the Chicago office forwarded that order to Worcester, it did not have any information as to whether or not the merchandise therein ordered was on hand in inventory at Worcester, nor did the Chicago office have any information whether or not Worcester could manufacture the items mentioned; the Chicago office did not know when the items could be shipped; upon receipt of the order, a manufacturing check was prepared at Worcester; the manufacturing check contains information that is not shown on the order, such as the manufacturing formula; Chicago office does not have any information about the formula used in the manufacturing of the articles order; the manufacturing check shows the mixing data; Chicago office did not have that information; the manufacturing check shows instructions to the kiln department, it shows instructions to the packing department; it shows the speeds at which the wheels are to be tested before shipment; it shows the maximum operating speed the customers use; none of that information is contained in the order received at Worcester; the manufacturing check contains [fol. 65] the method of shipment; that was determined at Worcester; the manufacturing check contains the price of the articles; the order did not contain that; an invoice was prepared for this order at Worcester; it is sent direct to the customer; the invoice indicates that the merchandise was shipped f.o.b. Worcester, care of Chicago store and contains the terms of the order; the terms are 2%, 20th of the month covering previous month's shipment, net 60 days; those terms are determined at Worcester; the Chicago office does not have any information as to whether or not the invoice was paid; Chicago office does not have any information as to whether or not customers pay any invoices; Chicago office sells merchandise out of inventory on hand; we prepare invoices from the Chicago office for the sale of merchandise on hand out of inventory at Chicago; our invoices direct payment be made to Worcester; Chicago does not know whether or not these invoices are paid; that is taken care of by the Worcester office; there are occasions every day when Worcester will reject an order sent by the Chicago office; Worcester will reject an order because the specifications may not be com-

plete or clear, where the wheels ordered cannot be manufactured, where the material required is not available or a particular type of abrasive is not available or the credit department will reject orders; Worcester would reject orders because it is financially impractical to manufacture the items; Worcester would also reject orders because there may be patent requirements which prevent the manufacture of certain items; Chicago office would not have any information in advance as to whether or not an order could be accepted or rejected; the order indicates that the [fol. 66] first item was furnished out of inventory in Worcester and the second item was manufactured in Worcester; referring to order 964289, which is part of Department's Group Ex. 13, Group O and to the receiving stamp shown on the order containing abbreviations, those abbreviations are no longer in use; they are obsolete; this happened to be an old receiving stamp we have had for some time which we still continue to use for no good reason at all; those different codes have no meaning to us any more; they were checked because some of the old employes who did check those used them in days gone by, still continue to use them, but they don't mean a thing as far as we are concerned at the present time; CR meant credit; PR meant price; they were checked because of force of habit; the credit of the Automotive Maintenance Machinery Company was checked at the Chicago office to determine if we had the authority from Worcester to accept the order from a credit standpoint, applying to material we have available in Chicago only; if the items mentioned are on hand at Chicago, Chicago office has authority to accept the order if the merchandise is on hand in inventory at Chicago; Chicago accepts it only insofar as the merchandise is on hand at Chicago; those are general instructions from Worcester; our instructions are that we have authority at Chicago to accept an order only if the merchandise is on hand at Chicago; those are instructions we have had for years and years; it is just a policy of the company; this particular order was not accepted in Chicago; the order was sent to Worcester by air mail for their acceptance or rejection; Chicago office does not have authority to reject an order where the merchandise is on hand at Chicago if the credit of a proposed customer is insufficient [fol. 67] as indicated by the records we have, or if there

is some doubt about it; in such a case the order is sent to Worcester for them to accept or reject; this particular order was sent to Worcester; upon the receipt of this order at Worcester, the credit of the Automotive Maintenance Machinery Company would be checked; every order received at Worcester is checked by the credit department; that is the first operation; the manufacturing check was prepared for that order and the billing instructions contained on the order were not there when it was received at Worcester; it was placed on there at Worcester; the invoice was prepared at Worcester; the Chicago order would not contain the price or the terms; the price and terms were determined at Worcester; the items mentioned in that order were not in the inventory at Worcester; I know that because the order is stamped "make manufacture"; the items ordered were manufactured at Worcester; the order was acknowledged from Worcester; the acknowledgment shows the customer's number and the date Worcester expected to ship; the original order contains a stamp showing when it was acknowledged, which was placed on the order at Worcester; the manufacturing check, which was prepared at Worcester, contains information not shown on the order, such as the manufacturing formula, mixing formula, truing and bushing instructions, packing instructions and how it was to be shipped; these were not contained on the original order; an invoice on this order was prepared at Worcester, sent direct to the customer; the invoice indicates the items were shipped f.o.b. Worcester, care of Chicago store; by that I mean Chicago warehouse; shipment care of Chicago [fol. 68] store is handled in the following way: the package is fully packed and wrapped and has a label on the outside showing the customer's name and address; it shows their purchase order number and it shows the contents, quantity and specifications of the contents of the package; the Worcester shipping department would put those packages in a box car at Worcester; the larger percentage of the contents of that box car was material for our own inventory and those small packages, as this one, was included in order to save transportation costs; it was the duty of Chicago office, upon receipt of that car, to forward those packages to the customers; this package itself did not contain instructions as to how it was to be shipped out of the Chicago office from the box car; Chicago ships by parcel post, express rail freight and by truck; order 947595 Department's Ex.

13, which is Group O, the merchandise mentioned in the order was not on hand at Chicago; Chicago forwarded the order to Worcester by air mail for their acceptance or rejection; it was received at Worcester and bears a receipt stamp; the order was checked for credit at Worcester; the merchandise was not on hand at Worcester; the items ordered were manufactured at Worcester; a manufacturing check was prepared with respect to that order; the customer ordered 50 wheels; the company actually manufactured 55 and shipped only 40; Chicago does not know the reason for that; that was known only to Worcester; the manufacturing check contained instructions not on the order; the order was accepted at Worcester; that order was not sent by Chicago to Worcester for filling; the purpose it was sent to Worcester was for Worcester to accept or reject.

Mr. Stark: The exhibit indicates that the order was [fol. 69] checked in Chicago because it bears the initials of one of your men in the Chicago office.

The Witness: Those are not initials of anybody in Chicago; those are not initials at all; they are simply a symbol to indicate the number of invoices the customer wants and 2 indicates in duplicate and LS indicates that the customer for some reason gets a special price; those are symbols used only by us in Chicago and for our purpose in Chicago; Worcester office does not know what those symbols mean; that is information only for Chicago in the event merchandise is in Chicago on hand; I don't recognize the initials MCC and the symbol W2; the figure 2 indicates the customer wants a duplicate invoice and the W indicates the white card; that is made in the square indicated as credit because it is easily seen there; that's where it is always placed; this particular order was edited and noted by our planning department at Worcester; it is so indicated on the lower left hand corner; Worcester office checked the price and the terms of credit shown on the manufacturing check; Worcester determined how the merchandise was to be shipped; Worcester directed how the merchandise was to be shipped from Chicago; they directed the package be shipped parcel post from Chicago; that is indicated on the manufacturing check; that would be indicated on the package itself when received at Chicago.

Norton Ex. 28; example of the credit file of the Chicago office, consisting of cards linked together, 1 inch wide, con-

taining the customer's name and address, whether or not the credit is okay, whether it is c.o.d., how many invoices the customer wanted.

Dept. Ex. S, explanation by Klingman of his audit.

Dept. Ex. S-1, letter from Norton to Department that [fol. 70] exhibits are 1 day's orders and are representative of an ordinary day's business and would apply for the full period of the term in question.

Dept. Ex. S-2, 4 orders from Illinois customers received at Worcester.

Dept's. Ex. S-3, 13 split orders received at Chicago, partially filled from Chicago stock, balance of order sent to Worcester for acceptance or rejection.

Dept's. Ex. S-4, 50 orders which the Department claims were originally received at Chicago, checked off and okayed for credit at Chicago and forwarded to Worcester for fulfillment.

Deft's. Ex. S-5, confirmation of teletype orders.

Dept's. Ex. P, consisting of list of orders, invoices, etc., picked at random from carload lot shipment of July 31, 1944, and analysis of each.

Order 965213, received, checked, okayed for credit at Chicago and forwarded to Worcester for fulfillment and shipped care of Chicago store;
Order 980062, received and billed at Worcester, shipped care of Chicago store
Order 990484, same
Order 217694, same procedure as order 965213.
Order 995818, same
Order 208952, same
Order 924492, same
Order 996181, same
Order 961666, order received and shipped from Worcester, care of Chicago store.
Order 225928, same procedure as order 965213.
Order 984754, order received and shipped from Worcester, care of Chicago store.

[fol. 71] Photostatic copies of original bill of lading, marked prepaid and photostatic copy of list of shipments which the above items were listed and checked.

Dept's. Ex. R is a list of invoices, orders, etc., which were shipped freight prepaid and picked at random from files showing complete transactions and analysis of each by the

department. The Department makes the following claims of these exhibits:

7/ 3/44 Order received in Chicago sent to Worcester for completion, credit okd in Chgo.
7/ 5/44 Order received in Chicago sent to Worcester for completion, credit okd in Chgo.
7/ 6/44 Order received in Chicago sent to Worcester for completion, credit okd in Chgo.
7/ 6/44 Order received in Chicago sent to Worcester for completion, credit okd in Chgo.
7/ 7/44 Order received in Chicago sent to Worcester for completion, credit okd in Chgo.
7/ 7/44 Order received in Chicago sent to Worcester for completion, credit okd in Chgo.
7/15/44 Order received in Chicago sent to Worcester for completion, credit okd in Chgo.
7/19/44 Order received in Chicago sent to Worcester for completion, credit okd in Chgo.
7/20/44 Order received in Chicago sent to Worcester for completion, credit okd in Chgo.

Item No. 2 shipped from Chgo. stock and items Nos. 2 & 3 shipped from Worcester, credit Ok'd in Chgo.

7/ 3/44	#943466	7 /7/44	#954035
7/15/44	#936605	7/15/44	#969542
7/ 6/44	#910612	7/19/44	#940192
7/ 6/44	#904493	7/30/44	#978554
7/ 7/44	#904042		

[fol. 72] Harry E. Walston, witness for Norton Company, testified:

Order 969588, which is part of Department's Ex. 13 of Group O, the last page is a purchase order of McGraw Electric Company, Elgin, received in Chicago by mail; it was not accepted in Chicago; that order was mailed to Worcester by Chicago office by air mail for Worcester to accept or reject; no part of the merchandise indicated by that order was on hand in Worcester; I know that because the order is stamped indicating that each item had to be manufactured; the stamp that is used by the Worcester office is "CB-make"; that indicates the item had to be specially manufactured; the order shows it was acknowledged; there is a stamp marked "acknowledged"; the order was acknowl-

edged in Worcester; the merchandise was manufactured in Worcester; sheet No. 1 is a copy of the acknowledgment attached to the exhibit; the acknowledgment was sent from Worcester direct to customer and indicates the date of shipment; Chicago office forwarded no instructions with that order when it was sent to Worcester; sheets numbers 3, 4 and 5 attached to that exhibit are the Worcester manufacturing checks prepared at Worcester in their entirely; those manufacturing checks contain a great deal of information not shown on the order; that is the same additional information to which I referred in speaking of other information; referring to the order, which is sheet 6, that does not contain the price of the items manufactured or the terms; the price and terms were determined at Worcester; sheet number 2 is an invoice which is included with that order; it was prepared at Worcester; the invoice was not [fol. 73] prepared at Chicago; the invoice indicates how the item was shipped and from where; it indicates the items were shipped f.o.b. Worcester 6, Massachusetts, care of Chicago store, parcel post from Chicago; Worcester determined how the items were to be shipped from Chicago; the invoice contains the terms of the order and the price; order number 959324, which is part of Department's Ex. 13, Group O, sheet number 3 thereof is a purchase order from Westclox, LaSalle, Illinois; the order was originally received in Chicago; no part of the merchandise ordered was on hand in Chicago; I can tell that by the stamps at the left of the page; the first item says "Entered finished stock"; Worcester uses that stamp; the next item is "CB-Make"; Worcester uses that stamp; that stamp means that the item had to be specially manufactured; the third item ordered was also marked "CB-Make"; that stamp is placed on the order at Worcester; that indicates that the first item of the order was filled at Worcester out of inventory on hand and that the second two items had to be specially manufactured; when Chicago forwarded that order to Worcester, Chicago did not have any knowledge of whether or not item was on hand in inventory at Worcester; Chicago did not know whether any of those articles had to be manufactured; Chicago did not know whether or not Worcester could or would manufacture the items; the order was not accepted at Chicago; that order was accepted at Worcester; Chicago office does not have any authority to accept an order if merchandise is not on hand at Chicago; Chicago office does not have authority to

reject any order; in case Chicago cannot accept an order the order must be sent to Worcester for their acceptance or re-[fol. 74] jection; if the merchandise is on hand at Chicago and the Chicago office does not have sufficient information concerning the credit of the proposed customer, Chicago office cannot accept that order; if the Chiago office had merchandise on hand and no information about the credit of the company, the Chicago office could not reject the order; Chicago office is not permitted to reject orders under any circumstances; orders must be sent to Worcester for them to accept or reject; this particular order was acknowledged; the order bears a Worcester stamp of acknowledgment; it was placed there at Worcester; the exhibit contains a copy of the acknowledgment which is sheet 2; that acknowledgment was prepared at Worcester; the acknowledgment was sent directly to the customer; the acknowledgment contains the customer's order number and indicates the dates on which each of the three items were expected to be shipped; the Chicago office did not have any information as to when the items could or would be shipped; that was determined at Worcester; sheet 4 is the Worcester manufacturing check, prepared at Worcester; that contains information not contained on the order about which I have testified; that is the same additional information concerning the formula and other instructions about which I testified in other exhibits.

Mr. Towle: These exhibits, as I understand it, and the Exhibits of the Taxpayer, 11 to 27, are used as typical orders, invoices, manufacturing checks, acknowledgment orders, to show the Department how Norton Company functions, what is done when an order is received and from these typical Exhibits and these Exhibits, both the Department's Exhibits and the Taxpayer's Exhibits 11 to 27, all are typical of the way the Company does business. That's why [fol. 75] we are bringing out in testimony an explanation of the Exhibits, showing how the company does business. That's the purpose. We, both the Department and the Taxpayer, could have brought hundreds of more Exhibits here but we, at Worcester, stipulated with the Department that a certain day's Exhibits were typical of all days and other Exhibits were typical, and we were trying to cooperate with the Department.

(Witness resuming) Sheet number 3 contains a receipt stamp placed there by Chicago as well as a stamp placed on there by Worcester; receipt stamp is placed on the order at

Chicago only for the purpose of showing the date the order was received at Chicago and that information is for the Chicago office only and only insofar as the order might be accepted in Chicago if the merchandise is on hand; that is true of all those orders generally; order 995339, which is part of Dept's. Ex. 13 of Group O, sheet 4 thereof is an order sent to Worcester for Worcester to accept or reject; the first two items mentioned therein had to be specially manufactured at Worcester; the third item was furnished out of inventory on hand at Worcester; the usual manufacturing check was prepared at Worcester on that order; the order shows it was acknowledged at Worcester; the order was accepted at Worcester; the order was not accepted at Chicago.

Sheet 2 is the acknowledgment of the order sent from Worcester and contains the shipping dates; sheet 1 is an invoice sent from Worcester to the customer; sheet 4 of order 900742, which is part of Department's Ex. 13, Group O, is an order sent to Worcester; no part of the merchandise therein described was on hand in the Chicago [fol. 76] inventory; it was not on hand in inventory at Worcester; the article was manufactured at Worcester; the order contains billing instructions; those were prepared at Worcester; the order indicates the customer was to receive a certain type of discount and the order was so stamped and stamped at Worcester; the order was noted in the planning department at Worcester; the order was acknowledged at Worcester and is so stamped; sheet 3 is the usual manufacturing check containing additional information not shown in the order; that is the formula and speeds of wheels, instructions to the grading and testing, truing and bushing departments and instructions to the shaving and molding departments and other information; that information was procured and placed on the manufacturing check at Worcester; the order did not indicate the price of the item to be manufactured; the Chicago office did not have any information as to whether the item could be manufactured; Chicago office did not have any information as to whether the item was on hand at Worcester; the order was acknowledged; sheet 2 is the acknowledgment; it was prepared at Worcester and sent direct to the customer; it contains the shipping date; the Chicago office did not have any information as to when the item could be shipped; the exhibit also contains a copy of the invoice; the invoice was not

prepared at the Chicago store; it was prepared at Worcester and sent directly to the customer; it states the terms and price of the items to be shipped; sheet 4 of order 944417, which is part of Dept's. Ex. 13, Group O, is a purchase order from the International Harvester Company, Rock Island; received at Chicago; it was forwarded to Worcester; after the order was received at Worcester, some of the specifica-
[fol. 77] tions contained in the order were changed, and from the specifications as changed, the usual manufacturing check was prepared; no part of the merchandise included in that order was on hand in the inventory in Worcester; each item had to be specially manufactured; the Chicago office did not have any information concerning the inventory at Worcester; Chicago office did not know whether the items could or would be manufactured; Worcester determined when the items could be shipped; Worcester notified the customer of the shipping date by the acknowledgment form which is sheet 2; that was sent from Worcester; that indicates the shipping dates; the Chicago office did not have any information concerning the shipping dates; the manufacturing check contains the usual additional information known only to Worcester, the same way I testified before; the order was accepted at Worcester.

The order was not accepted at Chicago.

Sheet 4 of order 987229 of Department's Ex. 13, Group O, is the usual order received by airmail at Worcester; after the order was received it was acknowledged; the billing instructions and discount instructions were placed on the order after it was received at Worcester; it was noted in the planning department at Worcester; the item was specially manufactured; that is indicated by the letters "CB-Make"; sheet 3 is the usual manufacturing check; it contains the same additional information not contained on the order; it also contains the price and terms and how the item was to be shipped; the order is acknowledged; sheet 2 is the form of acknowledgment; sheet 1 is a copy of the invoice sent direct to customer by Worcester and that [fol. 78] contains the same general information I testified to about the other exhibits.

Mr. Stark: Wherever the witness, in reply to the form of question as to whether the order was accepted at Chicago or Worcester, Department will enter a general objection to the answer as being a conclusion of the witness.

(Witness resuming) Sheet 3 of order 947479 of Department's Ex. 13, which is a purchase order of the Western Electric Company, shows no part of the merchandise therein described was on hand in inventory at Chicago; the order so indicates; the order is marked "CB-Make"; the item was manufactured at Worcester; this order was sent from Chicago to Worcester for Worcester to accept or reject; the order was noted in the planning department at Worcester; the order was acknowledged at Worcester and so stamped; sheet 2 is a copy of the Worcester acknowledgment direct to the customer; the order contains 7 over 6 written in pencil on the left-hand side; those figures were placed there by Worcester to indicate the date they expected to ship that particular item; that same date is shown on sheet 2, which is the acknowledgment of the order; that was determined at Worcester; Worcester determined whether or not the item could be manufactured; sheet 4 is a typical manufacturing check; it contains the usual additional information known only to Worcester; sheet 1 is a copy of Worcester's invoice sent direct to the customer for the merchandise described in the order; the original of that invoice goes to the customer; this exhibit is marked "copy" and is the company's copy, the Worcester copy; Chicago office gets a copy too; order 949223, part of Department's Ex. 13, [fol. 79] Group O, was an order received at Chicago; no part of the merchandise was on hand in Chicago; that order was not forwarded to Worcester for filling of the order; it was sent to Worcester by air mail for them to accept or reject; the first item ordered was not on hand in inventory at Worcester; Chicago office had no information whether the item was on hand; the other 2 items had to be specially manufactured; Chicago office had no information whether or not Worcester could or would manufacture the items requested; the items were manufactured; the order was accepted at Worcester; sheet 2 is the usual acknowledgment form; sheet 1 is a copy of the invoice; sheet 3 is the usual manufacturing check, prepared at Worcester; it contains additional information not shown on the order; that information was obtained at Worcester; Worcester determined how the items manufactured and shipped were to be shipped; Worcester determined when they were to be shipped; the order contains the usual figures on the left hand column giving the date 6 over 13 and 7 over 3; those are expected shipping dates and those are the shipping dates indicated on sheet 2 which is the

acknowledgment order; Worcester determined those shipping dates; Worcester determined how the items were to be shipped; the order was edited at the planning department at Worcester; sheet 3 of order 958353 of Department's Ex. 13, Group O, is another typical order; it indicates that all the items had to be manufactured at Worcester; it indicates the order was acknowledged; it was acknowledged at Worcester; the Chicago office had no information concerning whether or not Worcester could or would manufacture the items mentioned; the usual shipping date is indicated in pencil, 7 over 26, indicating [fol. 80] the item would be shipped July 26, '44; that's contained on the acknowledgment, sheet 2, sent by Worcester direct to the customer; sheet 4 is the usual manufacturing check prepared at Worcester; that's prepared upon receipt of the order at Worcester; this order and all other orders about which I have testified, clear through the credit department at Worcester; after the order is so cleared, the manufacturing checks are then prepared at Worcester; those manufacturing checks contain the usual additional information concerning the formulas, revolutions at which a wheel could operate and also instructions as to the maximum operating speed that the manufacturer who uses the wheel should operate the wheel for safety; it contains a lot of other additional information not contained in the order, such as terms, price, discount, method of shipment, when to be shipped, etc.; sheet 1 is a typical invoice prepared at Worcester and sent from Worcester to the customer; we know that every order that goes to Worcester has to clear through the credit department; there is nothing on the order to indicate that it has been okayed for credit at Worcester; if the credit of the customer had not been approved at Worcester, the item would not be manufactured.

The invoice is an indication that the credit of the Republic Tool and Drill Company to whom it was given, was approved at Worcester.

Order 201053 of Department's Ex. 13, Group O, was received at Chicago; the second item was on hand at Chicago; the third item was not on hand at Chicago; the second item appears to be scratched out in pencil, I don't know why; that's usually the practice we follow on split orders, if Chicago office fills part of an order we draw a [fol. 81] pencil through that and ship the item from Chi-

cago; as to the balance of the order, it then becomes an order for the remaining wheels described; Chicago office then sends that order to Worcester for Worcester to accept or reject; Chicago office does not have any information as to the inventory maintained at Worcester; it does not have any information as to whether Worcester can or could manufacture any of those items; Worcester determined whether items 1 or 3 could be manufactured; Worcester determined when the items could be shipped; that is indicated by the pencil memorandums on the left-hand side of the order; the order was acknowledged and bears an acknowledgment stamp, acknowledged from Worcester; sheet 2 is the usual acknowledgment order which also contains the shipping dates on the left-hand side of the order; the usual shipping or manufacturing check was prepared; that is sheet 3; it contains a lot of specifications, terms and prices not contained on the order at Worcester; the goods were manufactured at Worcester and shipped from Worcester; the usual invoice was prepared at Worcester; it refers to the items mentioned in the order; after the order was received at Worcester, the order was not intelligible as far as the specifications were concerned; Worcester made additions to the specifications so then the order would be intelligible for them to accept or reject; they indicated on the face of this order, as they do on many orders, additional specifications; that is done at Worcester; the order was not sent by the Chicago office to Worcester for filling; there were no instructions given by the Chicago office on this or any of the other orders about which I have testified, that an order should be accepted or not; Chicago office does not have enough information to deter- [fol. 82] mine whether an order could be accepted or not at Worcester; that goes for all of the exhibits in evidence in this case; sheet 4 of order 948338, which is part of Department's Ex. 13, Group O, was originally received at Chicago; none of the merchandise therein described on hand at Chicago; the order was sent to Worcester for their acceptance or rejection; after the order was received at Worcester there were additions and corrections to the specifications; from that order a manufacturing check was prepared; that is sheet 3; the order was acknowledged at Worcester and is so stamped; the order was accepted at Worcester; sheet 2 is the usual acknowledgment sheet, sent to the Mattison Machine Works at Rockford; it indi-

cates the shipping dates; those are the shipping dates, the number appearing on the left-hand side of the order; sheet 3 contains the usual additional information that the typical manufacturing check contains that were not shown on the order; sheet 4, the order in question, does not contain the price or terms of the merchandise; that information is found on the manufacturing check; that information was determined at Worcester; all manufacturing checks are prepared entirely at Worcester; the second item on the order was manufactured specially; the first item was shipped from Worcester inventory; the inventory on hand at Worcester comes from the goods manufactured at Worcester by the Norton Company at its manufacturing plant in Worcester; all of the items manufactured on hand at Worcester were manufactured at Worcester; the order containing "CB-Make" means they were made specially for this particular order; sheet 1 is a copy of the Worcester [fol. 83] invoice to the customer; the order was not forwarded by Chicago office to Worcester for filling; order 964144, part of Department's Ex. 13, Group O, sheet 5 is a copy of the purchase order from the Electro Motive Division, LaGrange, Illinois; item 4 contained on that order was on hand in inventory at Chicago; the order indicates it is for 43 wheels on line 4 instead of 50; when it was received at Worcester, it then is an order for 43 pieces instead of 50; Chicago sent the order to Worcester by air mail; after the order was received at Worcester, some of the specifications contained in the order were changed or added to; that was done to make the order intelligible at Worcester; the order itself shows the changes; it contains the letters "Cyl.Gr.Speeds"; that indicates that special speeds apply to those particular wheels; those stamps are put on by Worcester; it indicates also the speeds, revolutions at which the wheels are to be manufactured; I have been with Norton Company 34 years; I had 8 years' experience at Worcester; during those 8 years I was familiar with the methods used by the Norton Company at Worcester; I was quite familiar with their methods because I had charge of the adjustment section there, which meant I was in contact with all of the departments; the goods manufactured on this order as received in Worcester were manufactured in Worcester; the order was acknowledged at Worcester and is so stamped; sheet 3 is an acknowledgment sent by Worcester direct to customer; the items

were shipped from Worcester on 6 different dates from Worcester; sheets 4 and 5 of order 200381, which is part of Department's Ex. 13, Group O, are orders sent to Worcester; they are for grinding wheels; when the order was [fol. 84] received at Worcester there were additions made to the specifications; the specifications contained in the order were not sufficient; the order also contains the shipping date and it is so indicated; the order was acknowledged at Worcester and is so stamped; sheet 2 is the usual acknowledgment; sheet 3 is the manufacturing sheet; it contains the usual additional information not contained in the order; that information was procured at Worcester; Chicago office does not have access to that information; the manufacturing check contains the price and terms of the order; that was not contained on the order as received at Worcester; that information was determined in Worcester; sheet 4 of order 978783, which is part of Department's Ex. 13, Group P, is an order received at Chicago; it was not sent to Worcester for filling; the items therein described were manufactured at Worcester; the order indicated that George E. Detterbeck Company, the purchaser, ordered a partial shipment June 27th and the balance July 14, 1944; Worcester determined when the items were to be shipped; Worcester indicated on the order and on the acknowledgment that they would ship the merchandise on July 22nd; that is different from the date wanted by the purchaser; that was determined at Worcester; Chicago office had no information whether the item could be shipped, if at all, order 964937, part of the Department's Ex. 13, Group O, was received at Worcester and specifications were there changed; some of them were added to and some were deleted; both of the items ordered had to be manufactured; the order was acknowledged; the order was accepted at Worcester; the invoice prepared at Worcester indicates that package to the customer was to be shipped f.o.b. Wor- [fol. 85] cester 6, care of Chicago store and parcel post from Chicago; it also contains terms of payment; with reference to the credit memorandum, which was taxpayer's Ex. 28, those were prepared under my supervision; I am manager of the Chicago office; order 64347 of Department's Group S-3 bears Worcester number 365556; the order was originally received at Chicago; the first item ordered was on hand in inventory at Chicago; I know that because in the right-hand margin is the letter "E", indicating it was

entered; there is a line drawn through that first item; the 12 wheels first described were contained in inventory at Chicago; Chicago office shipped those wheels to the customer; Chicago office billed the customer for those 12 wheels; the invoice indicated that the bills were to be paid at Worcester; after the first item was shipped from Chicago the rest of the order was forwarded to Worcester for Worcester to accept or reject as to the part of the order which was not filled from Chicago stock; the order then became an entire order for the items not filled in Chicago; Chicago office had no information whether or not the merchandise listed on the second line was on hand at Worcester or whether the merchandise could be manufactured; the 8 years that I was at Worcester were prior to 1918; I have occasion to go to Worcester during the year; at least once a year and sometimes more frequently; I am familiar with the practice of the method by which Norton Company does business at its Worcester office; Norton Company at Worcester does reject an order that is a split order such as this; they do it for the same reason that they would reject an order sent down there complete; a split order, such as this, must be edited in its entirety for the [fol. 86] remaining part of the order; Worcester sends out the usual type of acknowledgment on a split order to a customer; the acknowledgment is sent from Worcester; the Worcester office checks the split orders for credit; the balance of the order would be accepted at Worcester; it was acknowledged at Worcester, credit checked at Worcester and they would determine whether or not the merchandise was on hand in Worcester; the Worcester office determines whether an item must be manufactured, how it is to be shipped, billed, price and terms; the Worcester office determines the shipping dates; the balance of those split orders follow the same pattern as the company followed in the orders about which I testified this morning, that is, there would be corresponding manufacturing checks, corresponding invoices, corresponding acknowledgment of orders; the operations are all the same; these split orders are edited the same way as an original order received at Worcester and the split orders are handled in the same way that an order is handled when it is received originally direct in Worcester; the only difference on split orders is that they are for less merchandise than original orders; they become an entire order for the balance of the merchandise; refer-

ring to order 64244 of Sunbeam Corporation, part of the first item ordered was on hand in Chicago and the balance of the order was then sent to Worcester office, and Worcester office, in that regard, follows the same procedure as it would on original orders; the practice in the Chicago office when it finds it has merchandise on hand and ships it to the customer, is that we cross off the entire quantity and all specifications by pencil and if only 2 of the 12 items in the last line are filled from Chicago, the figure [fol. 87] "12" would be changed to "10"; the order would then become an entire order for 10 wheels of that make; when the Worcester office receives a split order, they change the specifications if they are insufficient; Worcester may add to the orders and take from them to make them intelligible, the same as they do on an original order; Worcester office checks those split orders for credit, the same as they do an original order received at at Worcester; the rest of the orders contained in Group Exhibit 3 are all split orders and the procedure that I have testified to on the first several orders would follow for the balance of the orders; with respect to the split orders where we find that some of the items are on hand in inventory at Chicago, we check those orders for credit; we edit those orders as to the items on hand at Chicago; our checking of credit is only for the order insofar as it is for merchandise on hand at the inventory in Chicago; these split orders are not sent to Worcester for fulfillment or completion; the purpose they are sent to Worcester is for Worcester to accept or reject; referring to the exhibit just testified from, Keats-Lorenz Spring Company, down in the lower left-hand corner there is a stamp called "credit approved"; that is a Worcester stamp; I haven't noticed whether it appears on any of the other orders; picking an order at random, Department's Exhibit S-4, consisting of a sheet signed by L. J. Klingman, and approximately 50 orders, which is part of the first day's receipt of orders at Worcester, particularly received April 30, 1946, that is an order of Greenlee Bros.; it was originally received at Chicago; no part of the merchandise was on hand at Chicago; the order was not sent to Worcester for fulfillment; it was forwarded [fol. 88] to Worcester for the purpose of Worcester to accept or reject.

(Agreement with the department that the balance of the 50 orders in this group are not split orders.)

Referring to these approximately 50 orders, none of the merchandise therein described was on hand in Chicago; all of these orders were forwarded to Worcester; Worcester follows the same procedure of checking the credit of the customer at Worcester; every order Worcester receives is checked for credit by its credit department; every order received at Worcester is edited at Worcester; every order is checked to see whether the merchandise is on hand at Worcester; that's done by the Worcester office; each of these orders will have a typical manufacturing check prepared for each order, and all those manufacturing checks will contain information not contained on those orders, such as the price, terms, method of shipment, date of shipment, formula, mix, information to the bushing and shipping departments and things like that.

Mr. Stark: We are going to object to this line of questioning for the reason that the replies of the witness are contrary to the exhibits that are testified from. The witness testifies that this group of orders was sent to Worcester for credit approval, and yet they indicate on their face that credit was approved here in Chicago. It bears a Chicago stamp and is initialed in the credit square, indicating credit has been approved. There is nothing in the order that indicates it was sent to Worcester for acceptance or rejection. The fact appears that it was sent there for order filling only.

[fol. 89] (Witness continuing) With regard to all of these orders, 50 in number, Chicago office had no information as to what was contained in the inventory on hand at Worcester; Chicago office did not have any information as to whether or not any of the merchandise could or would be manufactured by Worcester; Chicago office did not know whether the merchandise could or would be shipped, or how; the purpose of putting a stamp on those orders at Chicago is because we stamp every order coming in to indicate the date it was received; all of those orders were checked at Chicago to ascertain whether or not any of the merchandise therein described was on hand in the inventory at Chicago; in all of those orders, the Chicago office found that the merchandise was not on hand; those 50 orders were accepted at Worcester.

Mr. Stark: Objection. Department objects for the reason it is a conclusion of the witness and isn't supported by any other testimony or evidence.

(Witness continuing) No one at Chicago has authority to reject orders; we have no authority to accept orders; the goods described in those particular orders were manufactured at Worcester; the goods were shipped from Worcester; some of the goods could have been shipped direct to the customer and some of them could be shipped through the Chicago store; sheet 4 on order 965213 of Group P is a purchase order from Borg & Beck Company of Chicago; it was originally received at Chicago; merchandise ordered was not on hand; the order was forwarded to Worcester by air mail for Worcester to accept or reject; Worcester acknowledged the order; the goods were not found to be on hand at inventory at Worcester; the goods [fol. 90] were manufactured specially for this customer at Worcester; page 4 of the order bears a Chicago receiving stamp; in the lower left-hand corner of that stamp appears letter "S" and number "3"; the letter "3" indicates to our Chicago billing department that the customer requires an invoice in triplicate; when the order was received at Worcester that information about the number of invoices was changed at Worcester; they marked the invoice a price duplicate; that's different from a triplicate invoice; that was determined at Worcester; Worcester determined what price would be charged for the merchandise ordered; Worcester determined what discount was to be given the customer; Worcester determined the shipping date; we publish a price catalog which is circulated to the trade; as far as the specifications or detail is concerned, the customer would know approximately what its price would be; on some of the purchase orders received, the price is put there by the purchaser; it is a practice to give discounts to customers on price; on this particular case, Worcester office determined what discount was to be given to Borg & Beck; the discount of 70 and 10 is indicated on the manufacturing sheet; this particular manufacturing check shows what speeds at which the company would test the wheels it made; it would also show what the safe speed for the manufacturer who uses the wheels may run those wheels at and the latter is less than the former; that is determined at Worcester; Worcester determined how those

items were to be shipped; in some cases the purchaser indicates shipping instructions on his orders; they are not followed in every case; the traffic department at Worcester determines the shipping instructions; on the order in ques-
[fol. 91] tion 965213, the customer did not indicate how the merchandise was to be shipped; the order was acknowledged at Worcester and the order was stamped; indicating it was acknowledged; that was stamped at Worcester; the invoice was prepared at Worcester and mailed from Worcester; the order was not forwarded to Worcester for filling; it was forwarded for their acceptance or rejection; if the order is accepted, it is then filled;

Mr. Stark: Actually, it is sent there for filling, isn't it?

Ans. No.

Mr. Stark: What percentage of orders that you sent to Worcester are rejected?

Ans. Not a very large percentage. Some of the reasons why Worcester rejects an order are that the customer's credit may not be satisfactofy to Worcester; the customer may be in arrears in payment of their account, Worcester would refuse to ship; the specifications ordered by a customer may not be practical to manufacture from a cost standpoint and also from a manufacturing standpoint; it might be financially advantageous to manufacture a wheel; Chicago office would have no information whatsoever as to whether or not it would be advantageous financially to manufacture a wheel; another reason why an order might be rejected is that a customer might order a specification that our safety engineers would consider unsafe to use; a customer may order wheels where specifications are not complete; another case might be where we haven't a particular abrasive available or the particular bore necessary to manufacture the wheel; there may be cases where the
[fol. 92] wheels cannot be manufactured because of patent reasons; there may be instances where customers specify an operating speed which our safety engineers at Worcester know is unsafe to operate at and we will refuse to accept such orders at Worcester; those reasons are known almost exclusively at Worcester; our experience in the demand for the customer trade in this area determines the inventory on hand at Chicago; we have approximately 3000 to 3500 items on hand in Chicago; I don't know how many items are manufactured by the Norton Company at

Worcester; order 980062 was received at Worcester; the original order was received at Chicago and copy sent to Worcester; copy was prepared in Chicago; it was then received at Worcester; the merchandise was not on hand at Worcester; the article was manufactured at Worcester specially for this customer; the specifications contained in the order that Chicago office sent to Worcester was not complete; it was changed at Worcester; the order, as the Chicago office sent it, could not be manufactured; they edited the order at Worcester; the order was noted by the planning department and edited at Worcester; the credit of the customer was checked at Worcester.

(Objection by the Department that there isn't anything in the exhibit that indicates credit was checked at Worcester)

The order that the Chicago office sent to Worcester did not contain the price of the articles or the discount to the customer; the manufacturing check prepared at Worcester contains the list price; that was determined at Worcester; the manufacturing check contains a discount; the discount was 55 and 5; Worcester determines the difference in discount rates; the order sent from Chicago did not contain [fol. 93] any information about discount; the order did not indicate how the item was to be packed; the manufacturing shows that; the manufacturing check shows that it is a small wheel finishing, 1-17; I don't know what that means; that information is known at Worcester; our order did not indicate how the merchandise was to be shipped; that was determined at Worcester; our order did not indicate when the item was to be shipped; that was determined at Worcester; it is indicated on the acknowledgment form and also on the invoice; it is indicated on the order with a pencil notation of July 19; that was put on at Worcester; sheet 1 is a copy of the invoice sent direct to the customer; order 990484, of Department's Exhibit Group P, sheet 4, is an order forwarded to Worcester; it did not contain the price or discount; the manufacturing check, which is sheet 3, changed the quantity of the wheels ordered; I don't know the reason for that; that was determined at Worcester; Worcester determined the shipping dates and the price and discount, and all the other information contained on the manufacturing check except the specifications and number of items to be manufactured; all of those items had

to be manufactured specially for the customer; order 217094, which is part of Department's Group Exhibit p, was originally received at Chicago; when it was forwarded to Worcester, Worcester indicated the billing instructions and the discount and when the item was to be shipped; Worcester changed the specifications and acknowledged the order and checked the order for credit and prepared a manufacturing check which contained information as to list price and discount and the usual other and additional information that is usually contained on the manufacturing [fol. 94] checks about which I have heretofore testified; the letter "W" on that order was placed on there at Chicago; that is information for our Chicago office; it is a symbol for a price on discount schedule; W-1 means the customer wants one copy of the invoice; figure 2 means it wants a duplicate and figure 3, a triplicate; S means special discount and W means ordinary consumer discount; we have only two that we use, W and S; that means nothing to Worcester; they don't know what those symbols mean; when the billing clerk sees letter "W" on it, that indicates to her consumer discount; she has nothing more to refer.

Mr. Stark: Then Chicago does have something to do with discount.

Ans. Oh, yes, we have to bill; we have to know what the discounts are, but those discounts are determined by our Worcester office.

Mr. Stark: Well, don't you have any information here in Chicago on discounts at all?

Ans. Yes, we have to have because we bill from Chicago all material shipped from Chicago. We have to have the list price and discount.

Mr. Stark: And the upper square marked "CR" means credit? That means it was checked also?

Ans. That indicates that this particular order was verified by this boy that we have in our office, against our credit file; it indicates that our credit file had a card giving us Worcester's approval to allow credit to cover any material that we might ship from Chicago; by "material shipped from Chicago", we mean inventory on hand at Chicago.

(Witness continuing) And the information contained on that stamp was information for Chicago office only insofar [fol. 95] as the merchandise is on hand in Chicago office; none of this order was filled from Chicago.

Mr. Stark: Why was this information important in this case?

Ans. Because the first operation of all orders have to be referred to credit file. That's the first operation we do. From there, it goes to our stock department and we don't know until it goes to that department whether we can fill from Chicago inventory or whether it has to go to Worcester.

Mr. Stark: In other words, if the merchandise is on hand at Chicago, you don't have to send it to Worcester for credit confirmation?

Ans. Not if we have an approval from Worcester to sell it.

Mr. Stark: You complete the order here in Chicago if credit is approved here and merchandise is here?

Ans. That's right.

(Witness continuing) I testified that the practice at Chicago was, upon receipt of a letter it was stamped with the stamp that it bears in this particular exhibit; it was stamped by the mailing clerk; I also testified that the next clerk that received that order was an 18-year-old boy who had this card index system.

GEORGE A. FYRBERG, witness of taxpayer, testified:

My name is George A. Fyrberg; I live at 51 Andover St., Worcester 6, Massachusetts; have been employed by the Norton Company 31 years; work in the Worcester office; have been there 31 years; am familiar with the methods by [fol. 96] which the Norton Company does business; sheet 4 of order 952332, part of Department's Ex. 13, Group O, is an order received from Chicago from Vandercook & Sons, sent to Worcester; Worcester got that order from the Chicago Office; the order itself was prepared at Chicago; upon receipt of that order at Worcester, it was accepted for credit by the credit department, then passed to the planning department and re-added to specifications at Worcester; the specifications were not complete to make an intelligible order; part of the merchandise was on hand, the first item was on hand; I know that because the order bears a stamp which reads, "Enter Finished Stock-4699"; the second item was not on hand and had to be specially manufactured, because it bears the mark "Make"; sheet 5 is a manufacturing check, prepared at Worcester; that

contains information not shown on the original order; it contains formulas, mixing instructions, setup instructions, shaving instructions and kiln instructions; it contains list price and discount and the net price; none of this information that is on the manufacturing check was on the order when it was received at Worcester; the stamp "ship to Norton Company, Chicago, Illinois," was placed on that exhibit at Worcester; that means the merchandise, when finished, was shipped to Chicago; the merchandise described in that order is not for inventory for Chicago but for some other purchaser, Vandercook & Sons; the merchandise was shipped F.O.B. Worcester, care of Chicago store; the merchandise was packed at Worcester; there is a packing slip and a shipping label produced at Worcester by manual typing; the duplicate goes on the inside and the outside becomes a shipping label; that shows the customer's name and address and order number; in this case [fol. 97] it does not contain instructions as to how the item is to be shipped; it does in other cases; Worcester acknowledged the order; that is sheet 2; it was sent to the customer by Worcester; the acknowledgement shows the customer's number, item number and approximate shipping dates; price and discount would be determined at Worcester; the manufacturing check also contained the speeds for the wheels; that was determined at Worcester; Chicago office does not have any information about the formula or the mix; that information is known at Worcester; we don't manufacture at Chicago; unless Chicago office had the information contained on manufacturing check, they could not determine whether or not we could manufacture the items listed in the order; sheet 4 of order 964290 or 964289 was received from the Automotive Maintenance Machinery Company at Chicago; the order was forwarded to Worcester for acceptance or rejection; the order was accepted at Worcester and is so stamped; Worcester does not have a stamp which marks an order "accepted"; when an order is accepted, it is sent to the editing department of the planning department which edits that order to be sure it can be either manufactured or filled from our stock; they prepare a manufacturing check; with regard to the credit department, the method by which it functions is as follows: The orders are received from the mail room by special messenger in the credit department; they have there on hand files showing the credit condition of that particular customer; we have

a card file system which is prepared by the larger file which shows statements from the reports of Dun and Bradstreet financial reports; they also, monthly, receive statements from the billing department showing delinquent accounts for people who are becoming bad business on credit; each [fol. 98] customer has an individual file; that file contains correspondence from the customer itself about its credit and local references and so on, and also contains replies from references and contains financial statements; Norton Company at Worcester subscribed to Moody service; they get financial statements, financial reports of various types from that service; those files are kept current, the department is in charge of an experienced credit man; he is a credit manager of at least 25 years' experience with us; that is all he does; on occasion, if he is in doubt as to credit of a customer, he leaves Worcester and goes direct to the customer to discuss it; it is a full time job with him; the Chicago office has no such information about a customer; Chicago office gets its information from Worcester; with respect to receipt of orders, the first department which would receive an order is our central mail room; the function of the clerks in the mail room is to open the envelopes, take out the contents; they stamp them with the receiving stamp showing the date and approximate time received; they then sort them out to various departments; all orders go in one pile, checks go to cashiers; accounts payable to the various departments involving the particular piece of correspondence; the orders are sent by special messenger to the credit department, where they check orders for credit; they go through them very rapidly because so many of our accounts are old accounts, and they are thoroughly familiar with them and simply scan through them; they check the name and customer; every order is checked.

Mr. Stark: Supposing we have a situation where we have the so-called split orders, and an order had been partially filled at Chicago out of inventory on hand. In that case, for the sale of the merchandise in Chicago, would the [fol. 99] Chicago office check that order for credit?

Ans. Yes.

(Witness continuing) When a split order is received at Worcester, it is checked for credit at Worcester, the same way that all orders are checked; Worcester considers such an order an entire order for the balance of the order and treats it the same way as it does an order which is not a

split order; there are occasions when they reject split orders; Taxpayer's Ex. 29 for identification, is an order taken at the Norton Company Chicago warehouse by telephone from Samuel Harris Company of Chicago; it consists of 7 items of grinding wheels of various specifications; 3 of these items were available in the Chicago inventory and were shipped from there; items 4, 5 and 6 were sent to Worcester for acceptance or rejection; item 4 was accepted for credit at Worcester but was rejected at the editors, planning department, because of an impractical specification shown on this order; the reason in this case was that the particular wheels in question were for size 1 x 1, and the order specified that it should be mounted on our one-eighth inch spindle; a wheel of this size cannot be mounted on a spindle as small as this without seriously being a safety hazard in use; it, therefore, was rejected; this order, upon receipt at Worcester, was checked for credit; this order is typical of all orders that may, for any reason, be rejected at Worcester; this order contains a stamp which shows that the order was rejected by a notation to the left of the item in pencil—"PP"; that means the item was rejected for further particulars; this and similar split orders are treated by Worcester as an entire order for the [fol. 100] balance of the order; with regard to the last 2 items listed in that order, one of the items was furnished out of inventory on hand and the other had to be manufactured; that order is such a recent one, we have not received the further particulars; if the customer can use the specifications that are makeable and safe to use, we would then release or accept that order; some of the reasons for which Worcester will reject an order are lack of sufficient credit information, impractical items to manufacture, that is, they may be too large in diameter, too thin in thickness or too heavy a wheel and have too small a hole in them; they may be off our charts as far as our ability to manufacture them; they might be rejected for specifications, also abrasives, width size, grade, structure and process; they would reject an order because it was financially impractical to manufacture; these are some of the more common reasons; I don't know what percentage of orders received by Worcester from Chicago are rejected. (Ex. 29 admitted in evidence).

The stamp contained in the lower right-hand corner of that order was put on at Chicago; the purpose is to show the date the order was received in Chicago and whether or

not the credit was acceptable at Chicago for goods that were shipped from inventory carried at Chicago, the Worcester office does not know the meaning of the abbreviations or symbols therein contained; that information is known to Chicago for their own purpose and for the sale of merchandise on hand out of inventory at Chicago and none other; that stamp is ignored by the Worcester office and the order is checked in its entirety and edited in its entirety, both for credit and for the planning department at Worcester; upon receipt of the order, the credit of the [fol. 101] customer would be checked completely at Worcester; the order would be edited at Worcester; no reliance would be placed on any stamp that was put on the order at Chicago; Taxpayer's Ex. 30 for identification is an order from Dane Manufacturing Company, sent to Chicago office; they, in turn, forwarded it to Worcester for acceptance or rejection and it was accepted for credit, but it was rejected by our editors; no part of the order was filled in Chicago; the central mail room would get the order first at Worcester; they send it to the credit department; the mail department would stamp the order with a receiving stamp and this order is so stamped; after the order left the mail department, it went to the credit department; the order was okayed for credit at Worcester; I know that because we wouldn't receive it or have it in our possession if it wasn't; the credit department doesn't necessarily stamp the order "credit okayed"; we can tell when an order has been through the credit department because we won't receive any order from any other place but by special messenger from the credit department; if it comes out of the credit department it is their responsibility, and if the credit department does not approve an order for credit it never gets to the planning department; the next department that gets the order after it leaves the credit department is the editing section of the planning department; this order reached the editing section of the planning department; I know that because it bears the initials "H.G.S.", and is also marked "F.P." at Worcester, questions mark under structure; also we have changed the order to read from 48 sets to 220 segments and we also marked a serial number; that order has been rejected by the Norton Company at Worcester; the stamp in the lower right-hand corner was put on the order at Chicago; that [fol. 102] is the same stamp about which I have testified on

Ex. 29; that stamp does not convey any information to the Worcester office other than the date it was received; that is all; there is no difference in the handling of orders upon their receipt at Norton Company at Worcester, or in the handling of orders direct from customers or through the Chicago office; all orders received at Worcester are sent direct from the mailing department to the credit department and regardless of the sources of the order, all orders are checked for credit; this is a typical example of an order that has been rejected by the Worcester office; that is the purpose of referring to exhibits 29 and 30; they are typical methods by which the Norton Company at Worcester does business; (Ex. 30 admitted in evidence).

Sheet 4 of order 947595 of Department's Ex. 13, Group O, is an order from the Elgin National Watch Company, received at Chicago; no part of the merchandise was on hand at Chicago; the order was accepted at Worcester; the Chicago office does not have authority to reject any orders; in a case where the Chicago office has inventory on hand sufficient to fulfill an order but the Chicago office does not have a card indicating that the credit of the particular customer is sufficient, Chicago office has no authority to reject that order; Chicago office must send that order to Worcester for the purpose of having it investigated by our credit department for acceptance or rejection; Chicago office has authority to accept an order only where they have inventory available at Chicago from which they can supply all or part of that particular order; in addition they must have credit approval from Worcester; order 947595 was not accepted at Chicago; it was sent to Worcester for [fol. 103] acceptance or rejection; the order was accepted at Worcester; the order was sent to the planning department and after that to the stock supervision department; a manufacturing check was prepared on that order and sheet 3 is that check; the planning department prepares the manufacturing checks; the manufacturing check contains information not shown on the order, such as formula, mixing instructions, hole instructions, truing, bushing and testing instructions; it contains the shipping dates which were determined at Worcester; the other additional information which appears on the manufacturing check was determined at Worcester; the order was acknowledged at Worcester by the planning department through a form; sheet 2 is the form of acknowledgment, sent direct to the

customer; it was shipped to the Chicago store, and parcel post from Chicago; Worcester determined how the item was to be shipped out of Chicago; Worcester determined how the item was to be shipped at all; the invoice indicates how the item was to be shipped; it says care of Chicago store, parcel post from Chicago; the invoice also shows it was shipped f.o.b. Worcester 6, Massachusetts; that was determined at Worcester; the testimony I have given concerning these few orders is typical of the manner in which the Norton Company does business and the purpose of my testimony is to show the Department how the company functions; I met Mr. Klingman and Mr. Hirsch at Worcester; I had several conversations with them; I discussed with them the manner in which Norton Company did business; I told them when an order is received at Chicago, the Chicago office gives the order a purchase number and I told them that Chicago office would check an order for price, etc., and okay the order for credit in the event the mer- [fol. 104] chandise was on hand at Chicago only; the Chicago office does not have authority to okay an order for credit if the merchandise is not on hand; I told Mr. Klingman and Hirsch that if the Chicago office was unable to fill the order at Chicago, that Chicago office would forward the order to Worcester; I explained to them that upon receipt of an order at Worcester, the order is checked for credit at Worcester, even though it came through the Chicago office.

Mr. Towle: Mr. Hirsch, after giving his name and experience, was asked this question by Mr. Stark:

> "Q. You heard Mr. Klingman's testimony relating to a conversation he had with Mr. Fyrberg. Were you present at that conversation?
>
> A. I was.
>
> Q. Will you tell us, in your own words, what Mr. Fyrberg's conversation was relative to the method employed by the Company in handling orders received by the Chicago office?
>
> A. After he gave us these sixty-seven orders which were representative of one day's business and which were also representative of the audit period itself, he sat down with us and gave us the story behind each invoice as to where it was received, how it was okayed, how it was forwarded to Norton, and how the orders

were filled, either in Chicago or filled at the Norton Plant home office.

Q. What did he say was the method employed?

A. The orders received here were—

Q. By "here", you mean at Chicago?

A. Yes, were okayed for credit and filled here if the merchandise was available, or where the merchandise was not available they were partly filled here or else filled in its entirety at Worcester, or else filled in part here and filled in part at Worcester.

Q. Were the orders accepted here in Chicago?

A. By the okay of the order for credit."

Q. Did you tell Mr. Hirsch or Mr. Klingman that the [fol. 105] orders described in this testimony were orders accepted in Chicago?

A. No.

Q. Did you tell him that the orders were okayed for credit here?

A. Only in the event that the merchandise was available at Chicago.

Q. What is the authority of the Chicago office with respect to the acceptance of an order?

A. They may accept it for shipment out of inventory at Chicago only.

Q. And who determines what the authority of the Chicago office is?

A. Worcester management.

Q. And how is that authority transmitted to the Chicago office?

A. Through conferences, by letter, and verbally.

Q. Reading further on Page 174 continuing in the testimony of Mr. Hirsch. Hearing officer Stark questions.

"Q. Testify to what he said" (referring to Mr. Fyrberg).

"A. He said the order is accepted here and is so indicated by the fact it was stamped, signed and okayed for credit which resulted in acceptance here."

Q. Did you tell Mr. Hirsch that?

A. No.

Q. Question by Mr. Stark directed to Mr. Hirsch?

"Q. Do you mean signed or initialed?

A. Initialed."

Q. Did you, Mr. Fyrberg, tell Mr. Hirsch that those orders bear an initial indicating that the orders were accepted?
[fol. 106] A. No.

Q. Continuing further on cross-examination by Mr. Towle, this question was asked Mr. Hirsch:

"Q. Did Mr. Fyrberg tell you what the authority of the Chicago office was with regard to the acceptance or rejection of an order?

A. He told us the Chicago office had authority to okay the order for credit and accept the order."

Q. Did you tell Mr. Hirsch that?

A. Only in the event the material was in the inventory in Chicago.

Q. And did you tell him the Chicago office had general authority to accept or reject any order?

A. No.

Q. The next question by Mr. Towle, addressed to Mr. Hirsch, was this:

"Q. Did he" (referring to Mr. Fyrberg) "say that they had authority to accept that order, to fill it only if the merchandise was on hand at Chicago?

A. No."

Q. Did you tell Mr. Hirsch that Chicago office had authority to accept the order and fill it only if the merchandise was on hand at Chicago?

A. Yes.

Q. Continuing further questioning of Mr. Hirsch, by Mr. Towle:

"Q. Was anything said about the acceptance of an order which was limited to the merchandise being on hand at Chicago?

A. No, it was not qualified to that extent."

Q. Did you qualify, Mr. Fyrberg, your statements as to how and under what circumstances the Chicago office could accept an order?

A. Yes.

[fol. 107] Q. And did you so tell Mr. Hirsch?

A. Yes.

Q. Further question by Mr. Towle to Mr. Hirsch?

"Q. You didn't ask him that, did you?

A. From what he told us, we understood whether the merchandise was available here or available at Worcester that it was received here regardless of whether it was a split order or filled in its entirety from Worcester."

Q. Did you tell Mr. Hirsch or Mr. Klingman or infer by innuendo or otherwise that the Chicago office had authority to accept an order if the merchandise was not on hand at Chicago?

A. No.

In order to accept an order for merchandise, it is necessary to know whether or not the merchandise is available at Chicago and whether Chicago has an approved credit card; if the Chicago office does not have the merchandise on hand, it would have to know whether Worcester could make the item or whether it was acceptable for credit at Worcester; Chicago office has no information as to what our inventory is at Worcester; Chicago office would not know whether Worcester could or could not manufacture an item; they would have no information concerning the formula, mix, information concerning the kiln, speeds, problems as to shipping nor how many orders we have on hand at Worcester; Norton Company does business through all 48 states and with foreign countries too; our mailing department at Worcester receives mail from all over the United States and foreign countries; we have 4 different deliveries of mail a day; we have 4 or 5 bags of mail on each delivery; there would be hundreds of letters in each bag and orders are received from all over the United [fol. 108] States; Chicago office does not know how many orders we would receive; Chicago office would not know what our problems are with regard to the manufacture of any item; Chicago office would not know how many orders we had on hand and had to fill prior to the acceptance of an order; all of this information should be considered prior to acceptance of an order; unless Chicago office had merchandise on hand, it could not accept an order.

Cross-examination.

By Mr. Stark:

I testified that credit was checked at Worcester; there is nothing on the orders as they come to us that would indi-

cate that the credit was approved at Worcester; I took that for granted that credit was approved because it came to our hands; there is no stamp or indication of any kind on the majority of orders; the reason the credit approval stamp may appear on some and not on others is that it may be held up for question by the credit department for possible rejection; when they go through, as I said before, they go through the entire lot of orders before them at the time, and there may be a small percentage of those which they hold to one side for further investigation; some orders are marked "credit approved"; most of them are not; Chicago office has information as to the credit standing of customers; Chicago office is unfamiliar with the editing of an order; they don't understand the different phases of it; if Mr. Walston, in his testimony, explained the complete edit information on orders, it would not change my answer; Norton Company is a Massachusetts corporation and that is the home office of the company; I had numerous conversations with Mr. Hirsch and Mr. Klingman; I spent a [fol. 109] lot of time with them; as I recollect we went over each and every one of those 67 orders and the assumption of the rest were about the same as the ones we looked at; I attempted to explain to them the methods and nature of the orders and methods of handling them in Chicago; some notes were made by Klingman and Hirsch; they did write something down; I did not make any notes; they were noting some of the information I gave them.

Louis J. Klingman recalled as a witness on behalf of the Department, testified:

I had a conversation with Mr. Fyrberg in the presence of Mr. Hirsch; I heretofore testified that Fyrberg told the method of handling orders originating in Chicago and sent to Worcester; I detailed my recollection of the conversation had at that time; in addition to the conversation had, notes were made or taken down by me from that conversation; those notes are at hand now; the notes indicate that various Groups S show the information as given to us by Mr. Fyrberg on the one day's test check of business explaining the various different groups as to split orders, orders that were received direct at Worcester without going to Chicago and orders that were not split, that is orders that were received originally at Chicago and

forwarded to Worcester for fulfillment of the complete order; the notations made at the time we listed these individual orders, or this one day's business excluding the resales or machinery equipment, were discussed with Mr. Fyrberg and written on the original sheet and we called off the numbers and listed them accordingly; Mr. Fyrberg helped us sort these orders so we could get through with our work a lot faster; on "S-3", these notations were made: [fol. 110] "These orders are split orders received in Chicago, partially filled from Chicago stock and forwarded to Worcester for completion of order. These orders were checked and okayed for credit at Chicago office." There were 13 in number; Group S-4, listing 50 orders, were listed each individually by number and the information given was: "These orders received at Chicago office; checked off and okayed for credit at Chicago, forwarded to Worcester, Massachusetts for fulfillment of order"; that was the information given us and that is exactly what we put down on our working papers and as I stated, we listed each one of these individual orders on our sheet so we had a record of what they consisted of; my testimony wasn't limited to memory only but to notes made at the time; Mr. Fyrberg testified he told me that when an order came into Chicago office and had to be partially filled from Worcester, the Chicago office did not have authority to okay for credit in that case; he did not tell us that the Chicago office had a right to accept or reject an order and okay it for credit as indicated on the stamps that were on the purchase orders; he did not limit that explanation; he made no mention of anything else.

HAROLD E. HIRSCH, recalled as a witness on behalf of the Department, testified on examination by

Mr. Stark:

I have listened to Mr. Klingman's testimony; I was present at the time; Mr. Klingman's testimony is correct; if I had not heard Mr. Klingman's testimony, my answers to the questions would be the same; it would be the same in [fol. 111] view of the fact of the written notations to support our oral understanding of it; I was present at the time the memorandums were made.

Re-direct examination of Mr. Fyrberg.

By Mr. Towle:

Q. Mr. Fyrberg, did you see what Mr. Klingman was writing on those memoranda?

Ans. No.

EDWIN E. MCCONNELL, a witness on behalf of the Norton Company, was examined and testified as follows:

The Department heretofore introduced in evidence Exhibits 14 and 15; they were pages A-86 and A-87; A-86 is a copy of an original freight bill and A-87 was a certification by Norton Company supporting a claim for $7.25; I examined the records of the Norton Company with reference to claim 75 made by the Norton Company to the Boston and Maine Railroad for damages; brought a copy of that claim; Taxpayer's Ex. 31 is a claim filed with the Boston and Maine Railroad on August 8, 1944 for damage shipped to Norton Company, Chicago; the claim was made by the Norton Company at Worcester; Ex. 32 is a memorandum of the traffic department showing the boxes shipped to Chicago on July 1, 1944; Taxpayer's Exhibit 33 is a bill to the Norton Company, Chicago, covering a shipment of 3 kegs of No. 150 El Alundum B and Exhibit 34 is an invoice of Boston and Maine Railroad for loss of 12 pounds of No. 80 El Alundum B, and 46 pounds of No. 150 El Alundum B; the amount of the claim is $7.25; the merchandise, which is the subject of the loss, was merchandise shipped to Norton Company, Chicago, for its own inventory; the [fol. 112] Norton Company is a Massachusetts corporation organized under the laws of Massachusetts; we are certified with the secretary of State of Illinois as a foreign corporation, doing business in Illinois for longer than the period of this claim.

Ex. 29, order of Samuel Harris & Company, typical of rejected orders.

Ex. 30, order of Dain Manufacturing Co., is example of rejected order.

Ex. 31, claim of Norton Company against Boston and Maine Railroad in the sum of $7.25 for damage to shipment of merchandise for its own inventory at Chicago.

Ex. 32, shipment via Boston and Maine Railroad, out of which claim for damage arose.

Ex. 33, invoice for merchandise sent to Norton Company inventory.

Ex. 34, invoice to Boston and Maine Railroad for $7.25 for damage to shipment for Norton Company inventory.

(All exhibits admitted in evidence.)

HARRY E. WALSTON, a witness of taxpayer, testified as follows:

Cross-examination.

By Mr. Stark:

All of the orders of Department's Ex. 13, Group O were received at Chicago, except 900742; after the orders were filled at Worcester in cases where the merchandise was not on hand at Chicago, Worcester sent these orders in carload lots to Chicago warehouse; it constitutes simply a part of the carload order; the majority of the carload shipment contained material for our own stock and we placed this mate-[fol. 113] rial in these cars primarily to save the customer the transportation; it was shipped to the customer, care of the Chicago warehouse, marked care of Chicago store; we did not continue to have title or possession to the merchandise; the material was sold to the customer, f.o.b. Worcester; it so states on the invoice; the invoice also says, "shipped care of Chicago"; that's a typical invoice; order 952332, which is part of Department's Ex. 13, Group O, contains a stamp "ship to Norton Company, Chicago, Illinois"; that stamp was placed on there at Worcester; the merchandise was shipped to Norton Company, Chicago; all these orders are so marked; all this merchandise was shipped care of Chicago store or Chicago warehouse; after we received the orders in Chicago, we shipped the merchandise to the customers in this territory in the State of Illinois in various carriers; Group marked S-3 was originally received by Chicago office; they are split orders; nothing appears on the order that would indicate that the merchandise was shipped to Chicago; referring to Group P of Department's Exhibit, contains orders that were originally sent to Chicago office; all the merchandise was shipped from Worcester care of Chicago store; the orders were billed from Worcester; we do billing at Chicago; we bill only

from Chicago when we ship from Chicago inventory and in no other cases; we don't have a collection department in Chicago; that is a firm rule and never departed from; that is an established firm rule of the company for years; no part of order 965213 was filled in Chicago; in my previous testimony about that order I testified that the order contains the letter S-3 and the letter 3 indicates to the Chicago office to the billing department that the customer wanted an invoice in triplicate; the reason that we at Chicago placed [fol. 114] that information on the order is that about the first operation performed on the order, it has to go through our credit file and the first notation placed on this order at the Chicago office is this "S 3" which is information only for Chicago office; S means customer is entitled to a special discount and the figure "3" indicated the customer wanted invoice in triplicate; the next procedure of this order is to determine whether or not this material is in Chicago warehouse, so this information means nothing to Worcester whatsoever; it is purely Chicago information; that is merely a symbol for our billing department; when those initials are placed on the order we haven't yet checked the order to see if the merchandise is in the Chicago inventory so the goods on the order, regardless of whether the merchandise is in Chicago inventory or forwarded to Worcester; if we had checked those orders for inventory on hand first, then we wouldn't find that information on the order if the inventory showed it did not contain the items ordered.

Re-direct examination.

HARRY E. WALSTON:

The stamp "Shipped to Norton Company, Chicago, Illinois" that was on the exhibits previously mentioned, was not on the order when it was received from Chicago; that was placed on the manufacturing checks by the traffic department at Worcester and that is for merchandise ordered for and by the customer, the McGraw Electric Company; the goods mentioned in the order were specially manufactured for the customer; the goods were packed and wrapped in Worcester; Worcester determined how the merchandise was to be shipped; they could have shipped it either direct to [fol. 115] the customer or to the customer through the Chicago warehouse in box car lots; Norton Company sends merchandise in box car lots to its warehouse in Chicago and

a lot of times those box cars are not entirely filled by the merchandise required for the inventory at Worcester and because they have additional space in the box car they ship these packages in the same car; those packages contain a label on the packages indicating who the customer is; it contains information as to how the warehouse men at Chicago are to forward that package to this particular customer and that is done to save transportation costs for the customer; this particular order indicates the Chicago store was directed to send the package parcel post from Chicago; the goods were shipped f.o.b. Worcester and that same procedure is followed in the other orders; Norton Company is manufacturer of abrasives and grinding machinery; we are not in the business of common carriers.

A partial abstract of the foregoing record made by hearing officer. Since the record has been fully abstracted herein, no purpose is served in setting forth this abstract.

Conclusions of Hearing Officer

Hearing officer noted the following conclusions:

1. The Taxpayer, Norton Company of Worcester, Mass., filed its claim in the amount of $100,692.01 covering the period of July 1, 1941 through September 30, 1944. Taxpayer is a Massachusetts corporation duly licensed to conduct business in Illinois as a foreign corporation. Its main office and plant is located in Worcester, Massachusetts. It has for many years maintained a branch office and warehouse in Chicago. It manufactures and sells grinding machines and abrasive products. Claim for credit herein is predicated [fol. 116] upon alleged sales made in interstate commerce to Illinois customers.

Two audits have been made of the books and records of the taxpayer at its home office in Worcester, Mass. in agreement with the Taxpayer, to arrive at the taxability, or non-taxability of the various classifications of the transactions forming a basis of its claim.

2. The audit procedure was as follows: the original audit was completed July 3, 1945 based upon one month's test check, viz. the month of July, 1944 under agreement with the Taxpayer as shown by letter of June 28, 1945 (see page 46 of the first audit, Department's Exhibit No. 9). The breakdown of the first audit, including the sale of machinery

and equipment designated at the Hearing as "A"; shipments made from Worcester, Mass. into Illinois in care of the Chicago store considered as "B"; shipments into Illinois and Chicago freight and express prepaid designated as "C"; shipments into Illinois and Chicago F.O.B. Worcester, classified as "E"; shipments via parcel post to Chicago and Illinois classified as "G"; shipments F.O.B. Worcester and into Illinois and Chicago taxed as to invoice classified "F"; shipments to Illinois and Chicago in care of Chicago store, tax added to invoice, classified "D"; sales from Chicago warehouse classified as "H". This audit was predicated upon all sales made in Illinois including machinery and equipment, wheel sales, emery and other parts sales and other merchandise.

Pursuant to the first field audit the Department allowed on original claim sales of machinery equipment in which tax was originally added to the invoice and refund was subsequently made by the Taxpayer to its Illinois customers [fol. 117] by the issuance of credit memoranda for the amount of tax collected, and which had been absorbed by Taxpayer's Illinois customers through a deduction of this amount from the amount owing to the Taxpayer. The basis for this allowance is the fact that Taxpayer's proposal specifically states and it is printed upon such proposal that machinery equipment is subject to acceptance in writing, by the Taxpayer at its main office in Worcester, Mass. The total amount of this allowance is $4,110.11 which is not an issue on this appeal. The record further shows that this is the only classification subject to acceptance in writing by the Taxpayer at Worcester (Se Department's Exhibit No. 9 with exhibits).

Subsequently, at a further hearing held in Chicago taxpayer admitted upon the record that the largest portion of the claim was predicated upon grinding wheel sales wherein no tax had been passed on to its customers and whereby the Taxpayer had absorbed tax which had been paid to the State of Illinois. In view of this situation it was stipulated and agreed that an additional audit be made based solely upon wheel sales and disregarding machinery sales as well as sales of other types of merchandise. So, in making the second audit, Field Auditors considered wheel sales only and made a test check of five months to arrive at percentages of the various type of sales listed in the first audit.

The second audit covers only sales classified in the first audit as "B" sales which were shipments from Worcester in care of the Chicago store in Chicago and Illinois customers; "C" sales classified in the first audit as comprising shipments from Worcester direct to Chicago customers by freight, express and parcel post prepaid with no additional charges shown in invoices; "E" sales also shown in the first audit comprising shipments from Worcester direct to [fol. 118] customers in Chicago by freight and express collect and parcel post charges added to the invoices.

In the second audit machinery and equipment sales which were allowed have been eliminated. The second audit, also in agreement with the Taxpayer, eliminated all sales made in care of Chicago store other than wheel sales and sales where tax was added to the invoice. "F" sales were eliminated comprising sales into Illinois and Chicago (other than wheel sales) where tax has been added to invoice. "H" sales are also eliminated, being Chicago warehouse sales which Taxpayer admits being taxable sales. Classification "G" sales are also eliminated which are included within Class "C" in the second audit.

Taxpayer's original exhibits 14 and 15 cover purchase orders mailed direct to Taxpayer from Worcester, Mass. where the shipments were made from Worcester by carload lots consigned care of Chicago store.

As a result of these two audits we arrive at the following figures showing allowances and disallowances made with respect to claim for credit filed herein by the Taxpayer:

Original claim for	$100,692.01
Allowed on machinery sales	4,110.11
	96,581.90
Taxpayer claims credit for wheel sales only	91,560.34
Difference	$ 5,021.56

The Taxpayer concedes tax upon the last named amount which covers items other than wheel sales.

3. Both audits, as previously stated, were made in agreement with the Taxpayer. The record shows that in making [fol. 119] these audits Field Auditor Louis J. Klingman and his assistant; Harold E. Hirsch, received the full co-

operation of Mr. Geo. Fyrberg in charge of Taxpayer's order department at its home office. In agreement with him and the Taxpayer, 67 orders constituting one day's sales were accepted as typical of all types of transactions involved in the claim for credit and percentages found to exist were applied to the entire period. In the second audit, in connection with Taxpayer's Exhibit No. 1 in evidence, being an analysis of wheel sales made by the Taxpayer, a test check was made for a selected five months agreeable to the Taxpayer for the purpose of arriving at percentage of the various classifications. However, no records were made available covering items shipped by ordinary parcel post and no records were available showing terms of shipment. The various percentages applying to each classification are set forth in the transcript pages 16 through 19.

In arriving at the various classifications in the second audit as well as to the function of the Chicago office in the acceptances or orders, o.k. of credit and transmittal to home office at Worcester for billing, both Mr. Klingman and Mr. Hirsch took notes which now form the basis of comments made in the second audit, upon statements made to them by Mr. Fyrberg.

While it is true that Attorney for the Taxpayer has interposed numerous objections to the testimony of field auditors and audit comments as being mere conclusions it should be noted also that the Hearing Officer similarly objected to the testimony of Taxpayer's witnesses with respect to their conclusions as to what various exhibits, forming the basis of the audit, as being self-serving in nature, not corroborated by the exhibits forming basis of the audit. [Fol. 120] This results in a mixed question of law and fact and we will let the record speak for itself inasmuch as the sole issue on this appeal is whether or not the various types of transactions classified in the second audit are taxable or nontaxable transactions.

4. The information supplied the field auditors by Mr. Fyrberg and confirmed from an examination of the orders themselves shows beyond all question that all orders of Illinois customers were received by the Chicago office, stamped in the Chicago office, checked for price, etc., okayed for credit in the Chicago office, which constituted acceptance in the Chicago office, and a duplicate copy transmitted to the Worcester office for filling. In the event that

grinding wheels were available in the Chicago warehouse, then the order was filled in Chicago. In the event that a portion of the order representing grinding wheels was not in stock in the Chicago office, then the balance of the order was transmitted to the home office for filling. This procedure was confirmed by an examination of one day's business covering 67 orders agreed as typical and applied to the entire audit period. The record further shows that each original order was given a Chicago number prior to transmittal of duplicate copy to the home office for filling.

5. While it is true that bills of lading show terms of shipment F.O.B. Worcester that the Taxpayer at all times had control of the shipment until delivery to Illinois customers by the Chicago office or, in case of shipment direct to Illinois customers by freight, express or parcel post, shipments were prepaid with no additional charges showing that title actually passed F.O.B. point of destination.

With respect to a portion of shipments made under [fol. 121] Class "E" to Illinois customers, the record does not disclose where original acceptance of the order was made. The burden was upon the Taxpayer to show full compliance with Section 6 in proving every element necessary to establish the interstate nature of the transaction. In the absence of any proof in this connection it must, we respectfully submit, be presumed that the original acceptance, okay for credit and transmittal for filling was in Chicago as in all other cases of sales to Illinois customers.

6. As above stated, the Taxpayer had control of the shipment at all times by reason of the fact that shipments were consigned to its Chicago office. Therefore, the Taxpayer would be compelled to bear all losses in the event of damage in transit. As a matter of fact, the record shows that a large proportion of the shipments were made in box cars with the name and address of each Illinois customer marked upon the package. The entire consignment was to the Chicago office and the Chicago office made delivery to the customer.

That the Taxpayer itself was of the opinion that it was liable for all damage in transit, is evidenced by the fact in one instance at least, that Taxpayer's Exhibits 14 and 15 show, in connection with that particular carload shipment, that there was a claim for damage filed against the railroad

company by the Taxpayer for breakage of merchandise. Photostatic copies corroborating the testimony of Field Auditor in this connection are attached to these two exhibits covering a carload shipment to Chicago store, being an analysis and verification of Taxpayer's Exhibits as presented in the first hearing (see page 18 of transcript).

7. Orders in the Chicago office originated, in many [fol. 122] instances, with Taxpayer's "engineers" who contacted the prospective customer to ascertain his particular need so that he might be furnished with grinding wheels suitable to that need. Testimony on behalf of the Taxpayer is to the effect that the "engineer" had no authority to bind the Taxpayer in any way but, nevertheless, it is plain that there was a meeting of minds between the Taxpayer and the customer within the State of Illinois by acceptance, okaying for credit, pricing, etc., which constituted acceptance within the State of Illinois and that thereafter the only function remaining was the filling of the order at the home office and shipment to the customer by the methods above enumerated.

8. Section III, paragraphs 1 and 2 of Article 5 of the Rules and Regulations relating to the Retailers' Occupation Tax Act, defines taxable sales of property originating in other states, following the decisions of the Illinois Supreme Court, reading as follows:

"SALES OF PROPERTY ORIGINATING IN OTHER STATES

"1. Tax liability under the Retailers' Occupation Tax Act is incurred when sales at retail are made, even though the property sold is transported directly to the buyer from a point outside this State, when the seller is engaged in the business of selling such tangible personal property at retail in this State, and when, in addition, physical possession of the property is received in this State by the purchaser or his representative. This is true even though the purchaser or his representative subsequently takes or sends such property outside this State or uses such property in the conduct of interstate commerce.

"2. Examples of engaging in the business of selling tangible personal property in this State are:

(a) a case in which the vendor or his representative [fol. 123] and the buyer or his representative execute in the State a formal contract of sale or contract to sell;

(b) a case in which the vendor or his representative, from a point in this State to the purchaser at a point in this State makes a complete and unconditional offer to sell which is accepted in this State by the purchaser or his representative;

(c) a case in which the purchaser or his representative, either from a point in this State or outside this State, makes an offer or counter offer to purchase which is accepted (i.e., approved so as to create a contract) in this State by the vendor or his representative; and

(d) a case in which the purchaser or his representative, either from a point in this State or outside this State, makes an offer or counter offer to purchase which is received in this State by the vendor or his representative, and which someone is authorized to accept (i.e., to approve so as to create a contract) in this State on behalf of the vendor. In such a case, it is not material that such authority to contract on behalf of the vendor is not exercised and that the offer or counter offer to purchase may actually be accepted outside this State by the vendor.

"Where a non-resident vendor acts in this State through a representative, it is immaterial whether such representative is stationed permanently in this State or whether he is merely sent into this State to perform his duties for the vendor. In the preceding examples, the place from which the property is delivered to the purchaser, and the place at which title to the property is transferred to the purchaser, are both immaterial."

In this connection, see Standard Oil Company vs. Department of Finance, 383 Ill. 136, and cases cited, which sustains the above quoted provision of Article 5 emphasizing [fol. 124] the fact that when it is a foreign corporation and is actually transacting business within the State of Illinois, and delivery of merchandise sold is made by the Taxpayer

within the State of Illinois, then, as in this case, the transactions are taxable.

9. To summarize, the evidence in this case shows, beyond all question we submit: 1. That the Taxpayer received and accepted all orders from Illinois customers at the Chicago office. 2. That all orders were processed at Chicago and where the merchandise was available was shipped from Chicago warehouse and that part of the transaction completed. 3. Cases where all or part of the order was not available at Chicago, the order—after office processing at Chicago—was sent to Worcester for filling. 4. The merchandise was then shipped either to Taxpayer in care of Chicago warehouse or to the customer direct. 5. That the Taxpayer had control of all shipments until delivery to Illinois customers within the State of Illinois by the Chicago office as to all contested items of this claim.

Based upon the testimony and the evidence, the Hearing Officer's findings should be sustained, viz. that Taxpayer's taxable sales, as reported, were correct. Tax paid thereon was not paid in error in fact nor in law and is not subject to refund except as to the amount of $4,110.11 which represents tax paid on sales in interstate commerce and that claim for credit herein be disallowed in the amount of $96,581.90.

Wherefore, for the reasons enumerated, I am of the opinion that claim for credit herein be disallowed in the amount of $96,581.90 and that it be allowed in the amount [fol. 125] of $4,110.11 for which amount Taxpayer has made proof and shown compliance with Section 6 of the Illinois Retailers' Occupation Tax Act, said compliance having been further confirmed by Field Auditor in his testimony and report.

By virtue of the foregoing and having concluded these hearings in accordance with the provisions of the Retailers' Occupation Tax Act and the Law, it is my recommendation that the Department of Revenue issue a credit memorandum to Norton Company, Worcester, Mass., in the amount of $4,110.11, covering the period of July 1, 1941 through September 30, 1944, inclusive.

Harry S. Stark, Hearing Officer. Hansen & Towle, Attorneys for Plaintiff-Appellant. Roland Towle, of Counsel.

[fol. 126] [Caption omitted]

[fol. 127] IN SUPREME COURT OF ILLINOIS

No. 31196

NORTON COMPANY, a Corporation, Appellant

vs.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS, Appellee

Appeal from Circuit Court, Sangamon County

ORDER OF SUBMISSION—November 30, 1949

Now on this day come the parties hereto and this being one of the days set apart for the call of the docket under the rules of this Court, and it appearing to the Court that appellant hath filed herein a duly certified transcript of the record and proceedings of the Court below, together with printed abstracts thereof, and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said appellee having entered motion to affirm said judgment and for costs and procedendo, and said motions being taken under advisement for final hearing, and the Clerk of this Court reporting that said cause is now ready to be taken, and said cause having been argued orally by Roland Towle for appellant and by William C. Wines for appellee is here submitted for the consideration and judgment of the Court:

Therefore it is ordered by the Court that this cause be and the same is hereby taken under advisement.

[fol. 128] IN SUPREME COURT OF ILLINOIS

No. 31196

NORTON COMPANY, a Corporation, Appellant

vs.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS, Appellee

Appeal from Circuit Court, Sangamon County. 94300

the modifications made on March 20, 1950, on pages four and six, being included in said opinion.

(Opinion modified on pages 4 and 6 upon denial of petition for rehearing on Mar. 20, 1950.)

Docket No. 31196—Agenda 52—November, 1949

NORTON COMPANY, Appellant,

v.

THE DEPARTMENT OF REVENUE, Appellee

OPINION—Filed January 18, 1950

Mr. JUSTICE DAILY delivered the opinion of the court:

Appellant, Norton Company, a corporation, filed its claim for credit with the Department of Revenue of the [fol. 129] State of Illinois for taxes paid under the provisions of the Retailers' Occupation Tax Act which, it is claimed, were not due under the provisions of the act. From a decision of the Department adverse to appellant on the principal issues involved, a complaint was filed in the circuit court of Sangamon County seeking a review under the provisions of the Administrative Review Act. The court affirmed the decision of the Department and the appellant appeals to this court because the revenue is involved.

Appellant, a Massachusetts corporation, has its plant and main office in the city of Worcester in that State. It manufactures and sells abrasive and grinding machines and products and keeps 18,000 items on hand in its Worcester inventory. It maintains an office and warehouse in Chicago, Illinois, where it keeps an inventory of about 3000 of its items. There are no salesmen used by appellant, but it does

have a group of engineers available to consult with prospective customers on their needs. These engineers do not solicit or take orders for goods.

Appellant does not ask for a credit for taxes paid on sales made out of the Chicago inventory to customers in Illinois, but does object to payment on sales supplied from Worcester, where the orders were sent direct to the home office and filled and shipped from Worcester, and in those cases where the inventory in Chicago could not supply an order and the material was shipped from Worcester. The shipment on sales involved in the claim for credit were in some instances sent direct from the factory to the customer in Illinois, and on other occasions were sent from Worcester in separately packaged lots *via* the Chicago office and warehouse for re-shipment to the purchaser in the original packages. It is the contention of appellant that the receipt of orders through its home office or through the Chicago office, followed by the shipment of the article directly from the factory in Massachusetts to the customer in Illinois, does not constitute the doing of business in Illinois so as to make such sales subject to the Retailers' Occupation Tax Act. The corporation further contends that such sales are specifically excluded from tax liability by the act. Also, it is claimed that such a tax is a burden upon interstate commerce which is prohibited by section 8 of article I of the Federal constitution.

The primary question before this court is whether the retailers' occupation tax, based upon the sales of goods for [fol. 130] consumption in Illinois, as represented by shipments of appellant from its plant in Massachusetts, infringes on the commerce clause of the Federal constitution by laying a burden on interstate commerce. Section 8 of article I of the constitution, declares: "The Congress shall have Power * * * ; To regulate Commerce with foreign Nations, and among the several States, * * *." When the State of Illinois imposes a tax for State purposes, does this tax impinge upon the power granted to the Federal government to regulate commerce by the aforementioned clause? There have been various measuring sticks, starting with *Brown* v. *Maryland*, 12 Wheat. 419, which stated the "original package" doctrine. Many interpretations have been announced since that case, but the whole problem and the preceding cases were discussed and explained by Chief Justice White in *American Steel & Wire Co.* v.

Speed, 192 U. S. 500. The Justice, summarizing, stated that the ruling question was not whether interstate commerce depended upon goods in movement or whether their movement had been completed or terminated, but that the essence of illegality depended upon whether a State's exertion of taxing power "operated upon interstate commerce as to amount to a regulation thereof, in conflict with the paramount authority conferred upon Congress." He continued that "the tax did not amount to a regulation in the sense of the Constitution, although its levy might remotely and indirectly affect interstate commerce." In this particular decision Justice White overthrew the contention that "a tax on goods in original packages as shipped in interstate commerce was necessarily a burden upon interstate commerce."

We are faced with a similar decision here. Taxation upon the use of articles by residents of a State has been maintained time and time again by the Supreme Court of the United States. In *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359, and *Nelson* v. *Montgomery Ward & Co.*, 312 U. S. 373, it was even declared permissible to require the retailer to act as collector of the tax within the State, and the court in those cases indicated that immunity to taxes by an interstate retailer is limited to those who merely solicit orders and do not maintain retail outlets in the taxing State. In *General Trading Co.* v. *State Tax Com.*, 322 U. S. 335, the court upheld collection of a tax even though the out-of-State company did nothing but solicit and deliver orders within the taxing State.

[fol. 131] There is no doubt that we are dealing with interstate commerce in the present case. As was said in *Central Greyhound Lines* v. *Mealey*, 334 U. S. 653, "The difficult task of determining whether a phase of commerce, concededly interstate, is subject to a particular incidence of State regulation, through taxation or otherwise, is not lessened by calling interstate commerce local commerce in order to sustain its local control. To state this persistent and protean problem of our federalism in the form of a question-begging fiction, is not to answer it."

The essence of constitutionality as determined by the commerce clause is no longer, if it ever was, determined by whether a State provision directly affects interstate commerce. The point to be considered is whether the inter-

state commerce is unconstitutionally burdened by the State regulation. (*Central Greyhound Lines* v. *Mealey*, 334 U. S. 653.) In the case cited there was involved a State tax on that portion of a bus-line ticket on an interstate trip which represented the mileage traversed within the State of New York. The journey involved was clearly interstate, yet the court held that the State did have a right to tax that exact percentage portion of the commerce with which it was intimately connected, *i. e.*, the mileage traversed within the State. It was said that the test as to the unconstitutional burden upon interstate commerce is whether a tax caused the particular section of commerce to carry more than "a fair share of the cost of the local government whose protection it enjoys." The trend of recent Supreme Court decisions is based upon this concept, the basic purpose of the commerce clause being regarded as the prevention of any particular State from isolating itself by its own acts from the rest of the United States, or of the creation of unfair discrimination by any State against the products of another State. The result of this modern trend is that a tax, such as the Illinois retailers' occupation tax, which may be "fairly apportioned to the business done within the state by a fair method of apportionment," is not considered unconstitutional. *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250.

Appellant relies strongly upon *Adams Mfg. Co.* v. *Storen*, (Opinion modified on this page upon denial of petition for rehearing.) 304 U. S. 307, which had to do with a tax on gross receipts levied by the State of Indiana on the vendor upon goods manufactured in the home State and sold in all [fol. 132] other States. The tax was declared unconstitutional by the Supreme Court because it made other States carry the burden of the increased sales price from the taxation, since the State of Indiana collected all the tax upon the sales made in other States without segregation or apportionment. It was held that a State must restrict its taxing activities to that particular part of a business which is particularly connected with the taxing State, and must not extend its taxing power to business conducted in other States. The same underlying principle was prevalent in *Bowman* v. *Continental Oil Co.*, 256 U. S. 642, *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86, and *Henneford* v. *Silas Mason Co.*, 300 U. S. 577.

Appellant also contends that sustaining this tax would be allowing the State of Illinois to tax an out-of-State resident and, as a matter of public policy, the tax should be borne by those who can protest it within the State. Appellant is in no different position in this regard than would be a retailer within the State and we cannot say that in this particular case it is any burden on appellant, or an attempt to tax beyond the borders of the State.

The cases decided by this court, upon which appellant principally relies in its argument that it is exempt from taxation on the shipments from its warehouse in Massachusetts to customers in Illinois, are *Ex-Cell-O Corp.* v. *McKibbin*, 383 Ill. 316, *Ayrshire Patoka Collieries Corp.* v. *Nudelman*, 383 Ill. 345, and *Allis-Chalmers Mfg. Co.* v. *Wright*, 383 Ill. 363. It will be noted that in the *Ex-Cell-O* case the objecting taxpayer had no office or warehouse in Illinois and solicited orders through what were called "manufacturers' representatives" with acceptance of the order and consummation of the sale occurring in another State. In the *Ayrshire* case, the orders for coal mined and shipped from another State were taken in this State by solicitors who had no power to accept or reject orders given to them, all of which were filled and delivery made to a common carrier in an outside State. In the *Allis-Chalmers* case, the objector maintained two local offices where the agents only solicited orders in Illinois, the goods being shipped from Wisconsin upon acceptance of the orders. This court, in each case, explicitly placed the exemption from taxation on the ground that there could be no tax on solicitation of orders only, the court, in each instance, finding as a matter [fol. 133] of fact that solicitation was the extent of objecting taxpayers' transactions in Illinois. On the other hand, we have held that a business which includes the taking of orders, the making of contracts, agreeing upon terms, receiving the payment and all other elements of the sale except delivery and transfer of title, is a business engaged in in this State and subject to the retailers' occupation tax. (*Standard Oil Co.* v. *Department of Finance*, 383 Ill. 136). Appellant's business, as conducted within Illinois, comes within this last definition of a taxable business under the Retailers' Occupation Tax Act. It has an office and warehouse in Chicago from which it fills any orders made directly to that office, if the products is in the Chicago warehouse. If all, or a portion, of the items are not

available at Chicago, the order is sent to appellant's home factory in Massachusetts. This is a business engaged in in this State. It is true that appellant does not complain about the tax on the orders filled in the Chicago office, but we cannot make the same distinction as does appellant on obligations under the Retailers' Occupation Tax Act.

It was never intended that interstate commerce should not bear its own share of taxation. There would be no doubt that the State could tax sales made by the appellant if it were an Illinois corporation selling to customers in this State. It would be inequitable to say that the same corporation should not pay a similar tax when it manufactures out of the State and ships and sells within the State. On the same basis, foreign corporations should not receive preference in business competition over business within the State by being exempt from paying such tax. By making the appellant pay, as in the situation before us, the State is not making an out-of-State company pay more than its fair share of the taxation burden. It is not attempting to tax gross receipts of appellant nor to tax goods which are sold or consumed or used in other States. The State is only making appellant pay the same tax as is required of its own citizens.

The tax claimed by the State upon the orders filled from (Opinion modified on this page upon denial of petition for rehearing.) the warehouse in Massachusetts, either on orders sent to the Chicago office or to the Massachusetts office, does not affect or hinder commerce in transit crossing [fol. 134] the State. It does not isolate or segregate the State from the rest of the Union, nor does it erect barriers which place an out-of-State business at a disadvantage in competing locally within the State. Appellant, by conducting an office, merchandise warehouse and outlet in this State, is placed on the same footing with all other retail business outlets. As such, it is subject to bear its share of taxation which the State of Illinois believes those retail outlets should assume, whether they are foreign or local. Appellant is licensed to do business within this State, it sells to consumers within the State, and to exempt it from the taxes here involved would give appellant an unfair advantage over other retail establishments in the same trade.

For the reasons above stated, the judgment of the circuit

court approving the administrative decision of the Department of Revenue is affirmed.

Judgment affirmed.

Mr. JUSTICE GUNN, dissenting.

[fols. 135-136] IN SUPREME COURT OF ILLINOIS

No. 31196

NORTON COMPANY, a Corporation, Appellant,

vs.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS, Appellee

Appeal from Circuit Court, Sangamon County, 94300

JUDGMENT—January 18, 1950

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.

Therefore, it is considered by the Court that the judgment of the Circuit Court of Sangamon County aforesaid, be affirmed in all things and stand in full force and effect, notwithstanding the said matter and things therein assigned for error.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 137] IN THE SUPREME COURT OF ILLINOIS

[Title omitted]

PETITION FOR REHEARING—Filed February 10, 1950

Now comes Norton Company, a corporation, plaintiff-appellant, and respectfully petitions the court to grant a rehearing.

I

Appellant believes certain points have been overlooked and misapprehended and desires to call them to the attention of the court.

Since appellee admitted appellant stated the facts correctly and completely, thereby a stipulation as to facts was entered into which is binding on the court.

The court said:

"Appellant claims that it absorbed the tax in question and paid the entire amount but the facts show that the con-
[fol. 138] sumers of this state, either directly or indirectly, had to pay the tax through the purchase price of the items which they purchased from appellant."

The claim of Norton Company covers the period from July, 1941 through September of 1944 (Abst. 31). During the period from July, 1941 through April, 1942, appellant added the sales tax to the purchase price and collected the tax. This tax was later refunded to the customer (Abst. 10, 11). After May 1, 1942, no tax was added to the purchase price by appellant and it bore the burden of the tax (Abst. 11, 15).

The court said appellant was engaged in business in this state, intimating it was so engaged as to other sales which were the basis of its claim for credit. The facts, as agreed upon by the appellee and which are binding on the court, are that the orders which were the basis of Norton Company's claim, were accepted in Worcester, Massachusetts, where the price, terms and condition of the sale were entered into, the goods were manufactured at Worcester and shipped from Worcester. That does not constitute doing business in this state. The fact that as to other sales not here involved, the appellant was doing an intrastate business, does not mean that appellant was doing an intrastate business when, as to other sales, the orders were

accepted in Worcester, the goods were manufactured at Worcester and shipped from there. The court pointed out that "there is no doubt that we are dealing with interstate commerce in the present case."

Appellant respectfully states that a company can do an intrastate business in this state and be liable for a retailers' occupation tax for conducting such a business and at the same time have other business in which the orders or contracts are accepted outside of the state and the goods for [fol. 139] which are manufactured outside of the state and shipped from out of the state into the state and thereby do an interstate business. The interstate business does not thereby become intrastate business nor is it taxed as intrastate business.

Since the court evidently placed some importance on the statement that Norton Company engineers consulted with *prospective* customers, we respectfully state that nowhere in the record was such a statement made. The implication is that those engineers were thereby soliciting business. That is not the case. Those engineers give a continuing technical service to all customers.

The court further says:

"It is the contention of appellant that the *receipt* of orders through its home office or through the Chicago office, followed by the shipment of the article directly from the factory in Massachusetts to the customer in Illinois, does not constitute the doing of business in Illinois so as to make such sales subject to the Retailers' Occupation Tax Act."

A correct statement of the contention is that the *acceptance* of the orders in Massachusetts followed by manufacture of the articles in Massachusetts and the shipping of the articles from Massachusetts does not constitute the doing of business in Illinois.

II

The basis of the court's opinion is that the interstate business of a foreign corporation which also does an intrastate business in this state is taxable because the intrastate business is taxable. Appellee has led the court into that position and cited no authority for it except those cases involving the use tax, sales tax, which are in fact a tax [fol. 140] on the purchaser and a manufacturer's tax. This

position is not tenable and has been so held by the United States Supreme Court and by this court in other cases.

The United States Supreme Court, in many cases, has expressly held that interstate business is not taxable merely because the company involved did an intrastate business in the taxing state. Because appellant is unable, under the rules of this court, to argue the point, it must be content, therefore, to merely cite some of the United States Supreme Court cases which are contrary to the court's opinion in the instant case. The United States Supreme Court cases are as follows:

Cooney v. *Mountain States Telegraph Co.*, 294 U. S. 384.

Looney v. *Crane*, 245 U. S. 178.
Crew Levick Co. v. *Pennsylvania*, 245 U. S. 292.
Brimmer v. *Rebman*, 138 U. S. 78.
Leloup v. *Port of Mobile*, 127 U. S. 640.

In *Cooney* v. *Mountain States Telegraph Co.*, 294 U. S. 384, the court said that a state cannot tax interstate commerce; cannot lay a tax upon the business which constitutes such commerce or the privilege of engaging in it and the fact that a portion of a business is intrastate and therefore taxable, does not justify a tax either upon the interstate business or upon the whole business without discrimination.

In *Looney* v. *Crane*, 245 U. S. 178, we find that Crane Company was an Illinois corporation which carried on its manufacturing business not only in Illinois but other states by shipment of merchandise on orders obtained from other states. Crane Company had a warehouse in Texas, from which it did an intrastate business in Texas. Texas attempted to tax the interstate business of the Crane Com- [fol. 141] pany and made the point that the interstate business could be taxed because Crane Company did an intrastate business in Texas. The court said at page 187:

"This view can only be sustained upon the assumption that the limitations of the constitution of the United States are not paramount but subordinate to and may be set aside by state authority as a result of the exertion of a local power. But original discussion is unnecessary since to state the proposition is to demonstrate its want of foundation and because the fundamental error upon which it rests has been conclusively established."

In *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292, the court in speaking of a mercantile tax measured on the volume of business transacted both intrastate and interstate, said that because the tax applies to internal as well as foreign commerce cannot save it; for, as was said in the case of the State Freight Tax, 15 Wall. 232, "The state may tax its internal commerce, but if an act to tax interstate or foreign commerce is unconstitutional, it is not cured by including in its provisions subjects within the domain of the state."

In *Brimmer* v. *Rebman*, 138 U. S. 78, the court said, at page 82:

> "Nor can this statute be brought into harmony with the constitution by the circumstance that it purports to apply alike to citizens of all states including Virginia; for a burden imposed by a state upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to all people of all states including the people of the state enacting such statute."

In *Leloup* v. *Port of Mobile*, 127 U. S. 640, the court said at page 648:

> "No state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid [fol. 142] on the transportation of the subjects of that commerce or on the receipts derived from that transportation, *or on the occupation or business of carrying it on*, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to congress."

That the opinion of the court in the instant case is contrary to the prior decisions of this very court, we cite the following cases:

O'Gara Coal Co. v. *Emmerson*, 326 Ill. 18.
St. Louis S. W. Ry. Co. v. *Stratton*, 353 Ill. 273.

This court, in *O'Gara Coal Co.* v. *Emmerson*, 326 Ill. 18, said at page 31:

> "While a state may impose a franchise or a privilege tax upon a foreign corporation based on the amount of its property owned in the State or the amount of its

intrastate business, the State cannot compel such corporation to submit to a tax on its interstate business or on its property outside the State as a condition of doing local business within the State."

This court again, in *St. Louis S. W. Ry. Co.* v. *Stratton*, 353 Ill. 273, said:

> "A state cannot require a foreign corporation as a condition of the right to do a local business to submit to a tax on its interstate business or on its property." (Citing *Airway Electric App. Co.* v. *Day*, 266 U. S. 71.)

All the above cited cases recognize the distinction between what constitutes doing an intrastate business and what constitutes doing an interstate business. The two cannot be combined to make all the business of the company intrastate.

Again, in 15 Corpus Juris Secundum, 475, we find the following:

> "The fact that a portion of the business is intra- [fol. 143] state does not justify a tax upon the whole business, and where a tax is exacted from one doing both interstate and intra-state business, it must appear that the tax is imposed solely on account of intrastate business, that the amount exacted is not increased because of the interstate business done."

And again in 15 Corpus Juris Secundum, 281, we find the following statement:

> "The fact that a business having aspects of both interstate and intrastate operations is conducted by a single corporation does not make the entire business either interstate or intrastate commerce but its character is determined by the particular transactions involved."

Appellee has lead the court to believe that Illinois can tax interstate business because Norton Company does an intrastate business in this state based on the opinions of the United States Supreme Court concerning the use tax. This state does not have a use tax and the very reason that that tax was imposed is because of legislation which this state

has not seen fit to pass. The Illinois retailers' occupation tax act expressly excludes such interstate business. The effect of the court's opinion is to legislate judicially in this state. Appellee has lead the court into an untenable position.

To justify its extension of the taxing power of the state to what it expressly concedes to be interstate commerce the court states it would be inequitable not to do so. Even if a state's taxing power can thus be extended merely to correct an inequity where otherwise it could not extend, which is at least debatable, the fact is that the effect of the court's decision approving such extension is to create inequities. The court concedes that concerns without retail outlets in Illinois may sell and ship their merchandise to Illinois customers from outside the state for consumption within the state without becoming liable for the Illinois [fol. 144] privilege tax, even though they may have resident sales representatives or traveling solicitors in the state. But, says the court, if one of these concerns also has a retail outlet however small in the state, it must pay a tax on all its sales to Illinois customers, made both at said outlet and directly in interstate commerce. In other words, the interstate commerce of one nonresident is taxable while precisely the same kind of interstate commerce of another is non-taxable. Indeed, the measure of the Illinois tax is a percentage of the receipts from a business engaged in selling tangible personal property in the state. When appellant paid this tax based on its sales in the state, how can it be compelled to pay additionally a tax based on its sales made outside the state? For the privilege of pursuing its occupation in the state, it paid the tax fixed by Illinois law, the same as other retailers in the state. Why should it be compelled to pay more, simply because it did an interstate business, which would concededly not be taxable if it had no retail store in Illinois?

Suppose A, appellant is taxed $1000, being 2% on its sales in Illinois from its Illinois warehouse, and $5000, being 2% on its sales from Massachusetts shipped in interstate commerce to Illinois buyers. A competitor, B, which has no retail outlet in Illinois, ships the same amount of goods from New York to Illinois buyers. B is exempt from Illinois tax. A pays $5000. This inequity would follow if the Illinois court's decision stands.

It is earnestly contended that while Norton Company does an intrastate business in this state, yet its other business which the court admits is interstate commerce, cannot be taxed merely because it does an interstate business.

Will not the effect of the court's opinion isolate or segregate the state from the rest of the union, and will it not [fol. 145] erect barriers which plage an out-of-state business at a disadvantage competing locally within the state? Will it not tend to drive out all foreign corporations from doing an intrastate business in this state?

This court in *Allis Chalmers* v. *Wright*, 383 Ill. 363, pointed out that Allis Chalmers, which was a Delaware corporation, maintained two retail offices in this state, from which it made sales under conditions which it admitted it incurred a tax liability and paid a tax on such business. Other parts of its business were disposed of in interstate commerce. This court there held that the interstate business of Allis Chalmers Company could not be taxed simply because Allis Chalmers did an intrastate business in this state.

The same situation applied in *National Cash Register Company* v. *Taylor*, 276 N. Y. 208, which appellant cited. There the cash register company had a local sales office in New York, from which it sold certain machines. It received orders which it could not accept in New York and sent those orders to the home office in Ohio. The orders were accepted in Ohio, the goods were manufactured in Ohio and shipped to the New York office for distribution to the New York customers. The court there held that such transactions constituted interstate commerce and the state of New York could not tax that interstate commerce merely because the cash register company did an intrastate business in New York.

Cases, without number, could be cited in addition to the foregoing, all denouncing the proposition contended for by the appellee in this case.

The court said in its opinion: "It was said that the test as to the unconstitutional burden upon interstate commerce is whether a tax caused the particular section of commerce to carry more than 'a fair share of the cost of the local [fol. 146] local government whose protection it enjoys.'" What protection, as to its interstate commerce, does Illinois afford a foreign corporation which has a plant out of the

state at which it accepts orders, enters into contracts, manufactures goods and ships goods in interstate commerce? By paying a retailers' occupation tax on its intrastate business that foreign corporation pays for the protection that this state affords its intrastate business, but we fail to see how Illinois gives any protection to a corporation whose situs is in a foreign state from which it does an interstate business. We can understand how the court can consider that certain foreign commerce should pay a fair share of the cost of local government, whose protection it enjoys where we have the situation of a bus company or carrier operating from Indiana to Iowa which uses facilities across the State of Illinois. Such tax may be sustained to pay for the protection this state affords. However, the facts in the instant case are such that the State of Illinois does not afford any protection to foreign commerce of a company doing business in the state of Massachusetts.

Since the retailers' occupation tax act expressly excludes interstate commerce from taxation, and the court says that there is no doubt but what we are dealing with interstate commerce, and since Illinois does not have a use tax, and since the United States Supreme Court has, in many cases, decided that the interstate business of a foreign corporation doing an intrastate business in a taxing state cannot be taxed, and since this court has also so held, it is respectfully urged that a rehearing be granted herein.

Respectfully submitted, Hansen & Towle, Attorneys for plaintiff-appellant.

Roland Towle, of Counsel.

[fol. 147] IN SUPREME COURT OF ILLINOIS

[Title omitted]

ORDER DENYING REHEARING—March 20, 1950

And now, on this day, the Court having duly considered the petition for rehearing filed herein, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies a rehearing in this cause.

[fol. 148] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 149] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1950

The petition herein for a writ of certiorari to the Supreme Court of the State of Illinois is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office - Supreme Court, U. S.
FILED
JUN 15 1950
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. ~~1949~~ 1950

No. 133

NORTON COMPANY, a corporation,
Petitioner,

vs.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS AND BRIEF IN SUPPORT THEREOF

ROLAND TOWLE,
111 W. Washington Street,
Chicago 2, Illinois.
Counsel for Petitioner.

BARNARD & MILLER, 33 S. Market St., Chicago 6. FRanklin 2-0562

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949

No. _____

NORTON COMPANY, a corporation,

Petitioner,

vs.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable Fred M. Vinson, Chief Justice of the Supreme Court of the United States, and the Associate Justices of the Supreme Court of the United States:

The petition of Norton Company, a corporation, by Roland Towle, its counsel, respectfully shows to this honorable court:

SUMMARY AND STATEMENT OF THE MATTER INVOLVED.

The Supreme Court of Illinois, in a decision which became final March 20, 1950 (R. 128), held that the State of Illinois could levy its retailers' occupation tax on a corporation for the privilege of doing an interstate business. Since the decision, which is reported in 405 Ill. 314,

affects the title, rights, privileges and immunities of Norton Company, it files this as its petition to review said decision.

There is no controversy concerning the facts. Norton Company is a Massachusetts corporation. It manufactures and sells grinding wheels, abrasive products and grinding machinery. Its manufacturing plant and main office are at Worcester, Massachusetts. The orders involved were all accepted in Massachusetts, the goods ordered were all manufactured in Massachusetts and were all shipped from there to Illinois customers in interstate commerce. Norton Company also has a warehouse in Illinois from which it does an intrastate business in Illinois. (R. 12)

This case arose when Norton Company filed with respondent its claim for credit for Illinois retailers' occupation taxes paid which were actually not due. The claim is in the sum of $100,692.01 (R. 30) and was based on sales, the orders for which were accepted in Massachusetts, the goods for which were manufactured in Massachusetts and shipped from there to Illinois customers in interstate commerce. (R. 12) No part of its claim was based on its intrastate business. (R. 12) The tax concerning the intrastate business was promptly paid and is not here involved. Hearings were had on the claim which resulted in a final administrative decision of respondent disallowing the claim to the extent of $96,581.90 (R. 11), although all the orders involved therein were accepted in Massachusetts, all the goods were manufactured there and Norton Company as to all such sales was admittedly engaged in interstate commerce. (R. 131)

Norton Company duly appealed to the Circuit Court of Sangamon County, Illinois. In its complaint it set forth the following specification of errors, *inter alia*, to-wit: "said decision violates section 8 of article I of the constitution of the United States; it is contrary to the pro-

visions of the Illinois retailers' occupation tax act and the refusal to allow petitioner's claim in its entirety constituted an attempt by Illinois illegally to tax interstate commerce." (R. 2)

The Circuit Court, although finding that the goods had been shipped in interstate commerce, affirmed the administrative decision and held the sales were taxable under the Illinois occupation tax act. (R. 5)

An appeal to the Supreme Court of Illinois then followed. (R. 7) The Illinois Supreme Court, in its opinion, pointed out that Norton Company raised the question of the validity of the tax because it *is* a burden on interstate commerce as prohibited by section 8 of article I of the federal constitution and said:

> "* * * It is the contention of appellant that the receipt of orders through its home office or through the Chicago office, followed by the shipment of the article directly from the factory in Massachusetts to the customer in Illinois, does not constitute the doing of business in Illinois so as to make such sales subject to the Retailers' Occupation Tax Act. The corporation further contends that such sales are specifically excluded from tax liability by the act. Also, it is claimed that such a tax is a burden upon interstate commerce which is prohibited by section 8 of article I of the Federal constitution.
>
> The primary question before this court is whether the retailers' occupation tax, based upon sales of goods for consumption in Illinois, as represented by shipments of appellant from its plant in Massachusetts, infringes on the commerce clause of the Federal constitution by laying a burden on interstate commerce. Section 8 of article I of the constitution, declares: 'The Congress shall have Power * * *; To regulate Commerce with foreign Nations, and among the several States, * * *'. When the State of Illinois imposes a tax for State purposes, does this tax impinge upon the power granted to the Federal government to regulate commerce by the aforementioned clause? * * * There

is no doubt that we are dealing with interstate commerce in the present case." (R. 128)

The Supreme Court of Illinois in its opinion said the point to be considered is whether interstate commerce is unconstitutionally burdened by the state regulation and concluded that it was not. It held that the interstate commerce of a foreign corporation which also does an intrastate business in the state of Illinois is taxable because the intrastate business is taxable. In so holding, the court passed on the federal constitutional question raised by petitioner, construed the state statute as authorizing the imposition of a state tax on the privilege or occupation of engaging in interstate commerce and yet held that the statute, as thus construed, did not violate the federal constitution.

JURISDICTIONAL STATEMENT.

It is contended that this court has jurisdiction under section 1257 (3), title 28 United States Code, Judiciary and Judicial Procedure.

The state statute involved is the Illinois retailers' occupation tax act (chapter 120, Illinois Revised Statutes, 1949, section 440, *et seq.*), and is to be found in volume 2 of Illinois State Bar Association Edition of Illinois Revised Statutes, 1949, page 787. The pertinent sections are listed in the appendix hereof.

Section 2 of said act, which is directly involved, is as follows:

> "A tax is imposed upon persons engaged in the business of selling tangible personal property at retail in this State at the rate of three per cent (3%) of the gross receipts from such sales of tangible personal property made in the course of such business prior to

July 1, 1941, and two per cent (2%) of ninety-eight per cent (98%) of the gross receipts from such sales after June 30, 1941. However, such tax is not imposed upon the privilege of engaging in any business in interstate commerce or otherwise, which business may not, under the Constitution and statutes of the United States be made the subject of taxation by this State."

The tax is an occupation tax and is not a sales or use tax.

The opinion of the Supreme Court of Illinois was rendered January 18, 1950. On a petition for rehearing duly filed, the opinion was modified by deleting therefrom one sentence. In addition thereto, one of the justices then dissented from the opinion. The petition for rehearing was denied March 20, 1950, and the opinion thereupon became final. The Supreme Court of Illinois is the court of last resort in the state of Illinois.

The federal question was specifically raised at the inception of the filing of the claim. The complaint, as above set forth, raised the federal question, the briefs of petitioner also raised the federal question and the Supreme Court of Illinois, in its opinion as above set forth, showed petitioner contended that the tax involved was a burden on interstate commerce and was prohibited by section 8 of article I of the federal constitution. The federal question was an issue before the court and was the basis for its decision. Since the title, rights, privileges and immunities of petitioner were specifically set up and claimed from the inception of the claim and throughout the entire proceeding and were the basis of the decision of the Illinois Supreme Court, it is respectfully submitted that this court has jurisdiction to review its judgment.

Your petitioner presents to this court and files herewith as an exhibit hereto, a duly certified transcript of the entire record in the case as the same appears in the Supreme Court of Illinois.

QUESTIONS PRESENTED.

1. May the State of Illinois, impose its retailers' occupation tax on a Massachusetts corporation for the privilege of doing an interstate business because that company also does an intrastate business in Illinois upon which it pays such privilege tax to Illinois?

2. Does the Illinois retailers' occupation tax, as imposed on admittedly interstate commerce, constitute an unconstitutional burden upon interstate commerce?

REASONS FOR THE ALLOWANCE OF THE WRIT.

The reasons relied upon by petitioner for the allowance of the writ are as follows:

1. The Supreme Court of Illinois has decided federal questions in a manner which conflicts with the decisions of this court.

2. The Supreme Court of Illinois, in holding that the Illinois retailers' occupation tax act validly imposes a tax on the privilege or occupation of doing an interstate business, has decided a federal question of substance.

3. The decision of the Supreme Court of Illinois is in direct conflict with *Cooney* v. *Mountain States Telegraph Co.*, 294 U.S. 384, *Looney* v. *Crane*, 245 U.S. 178, *Leloup* v. *Port of Mobile*, 127 U.S. 640, *Crenshaw* v. *Arkansas*, 227 U.S. 389, *Freeman* v. *Hewit*, 329 U. S. 249, and many other decisions of this court.

4. The opinion of the Illinois Supreme Court is also in direct conflict with an earlier opinion of the Circuit Court of Appeals for the Seventh Circuit. The Court of Appeals had before it the very same Illinois retailers' occupation tax act. In that case, *In re Globe Varnish Co.*, 114 Fed. (2d) 916, it held that Illinois could not, under the act, tax interstate commerce. In so holding, it followed the decisions of this court. Confusion will continue to exist until this court resolves the problem.

5. The questions involved are substantial, not only in the amount of the claim of the Norton Company, but in the effect the opinion will have on all foreign corporations doing both an intrastate business in Illinois and an interstate business.

6. Since historically this court has acted to resolve conflicts in jurisdiction and to settle important principles of law, the writ prayed for should issue, not merely for the purpose of examining into the matters of the instant case, but for the benefit of other state courts which may be in doubt if the opinion involved is permitted to stand or which may be encouraged to follow Illinois in its attempt to tax the privilege of engaging in interstate commerce.

7. While this court has permitted states, by means of a use tax, a sales tax, and a manufacturer's tax, to reach articles which have moved or are about to move in interstate commerce, and has permitted the *ad valorem* taxing of property used in interstate commerce, this court has never permitted a state to go so far as to tax the privilege or occupation of doing an interstate business.

WHEREFORE, your petitioner prays that a writ of certiorari issue, directed to the Supreme Court of Illinois, to the end that this cause may be reviewed and determined

by this court, that the judgment below be reversed by this court and that petitioner may be granted such other and further relief as to the court shall seem meet.

Dated this 6th day of June, 1950.

NORTON COMPANY, *a corporation,*
Petitioner,

By ROLAND TOWLE,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949

No. _____

NORTON COMPANY, a corporation,

Petitioner,

vs.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINION OF COURT BELOW.

The opinion of the Supreme Court of Illinois in this cause (R. 128) is reported in 405 Ill. 314.

JURISDICTION.

The judgment of the Supreme Court of Illinois became final March 20, 1950, when a petition for rehearing was denied. (R. 128)

The statutory provision which is believed to sustain the jurisdiction of this court is section 1257 (3) of title 28, United States Code, Judiciary and Judicial Procedure. This petition is filed within ninety days of the entry of such final judgment. Sec. 2101 (c) Judicial Code. The issue below was whether the Illinois retailers' occupation tax, as applied, is repugnant to the federal constitution and whether or not the title, rights, privileges and immunities of Norton Company have been violated by the decision of the Illinois Supreme Court. A statement of the proceedings below leading to the final judgment of the Supreme Court of Illinois is contained in the preceding petition which is hereby adopted and made a part of this brief.

STATEMENT OF THE CASE.

Petitioner is incorporated under the laws of the state of Massachusetts and manufactures and sells grinding wheels, abrasive products and grinding machines. It has its manufacturing plant and main office in Worcester, Massachusetts (R. 12), where the general ledgers, books, records and invoices are kept and collections are made. (R. 17) It manufactures approximately 225,000 items and since some of the items are sold repeatedly, it keeps approximately 18,000 items on hand in its inventory at Worcester. (R. 17)

It is authorized to do business as a foreign corporation in the state of Illinois and maintains an office and warehouse in Chicago where it keeps on hand an inventory of approximately 3,000 items. (R. 17)

The orders involved were all accepted in Massachusetts, and the goods involved were all manufactured in Massachusetts and shipped in interstate commerce to customers located in Illinois. (R. 12) The state Supreme Court, in

its opinion, said there was no doubt that we are dealing with interstate commerce in the present case. (R. 131)

Petitioner concedes its intrastate business in Illinois is taxable under the retailers' occupation tax act but contends that the state of Illinois cannot tax the privilege or occupation of doing an interstate business. There is no dispute as to the facts in this case. A more detailed summary of the facts is set forth in the preceding petition.

SPECIFICATIONS OF ERROR.

The Supreme Court of Illinois erred in declining to follow the principles established by this court in many cases in which the states have been denied the right to tax the privilege or occupation of engaging in interstate commerce.

It erred in holding that the State of Illinois may tax the privilege of engaging in interstate business by a foreign corporation which also did an intrastate business in Illinois upon which it paid a privilege tax levied by that state.

It also erred in holding that the Illinois retailers' occupation tax act, now construed as applying to the interstate business of petitioner, is not repugnant to the commerce clause of the federal constitution.

ARGUMENT.

I.

The Supreme Court of Illinois erred in declining to follow the principles established by this court to the effect that no state can tax the privilege or occupation of engaging in interstate commerce.

The opinion of the Supreme Court of Illinois is contrary to the decisions of this court expressed again and again to the effect that the several states cannot tax the occupation or privilege of engaging in interstate commerce. The fact that Norton Company was doing an intrastate business in Illinois does not cure the defect. In *Freeman v. Hewit*, 329 U. S. 249, this court said, at page 254:

> "It has been suggested that such a tax is valid when a similar tax is placed on local trade, and a specious appearance of fairness is sought to be imparted by the argument that interstate commerce should not be favored at the expense of local trade. So to argue is to disregard the life of the commerce clause. Of course a state is not required to give active advantage to interstate trade. But it cannot aim to control that trade even though it desires to control its own. It cannot justify what amounts to a levy upon the very process of commerce across state lines by pointing to a similar hobble on its local trade."

In *Philadelphia and S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, this court said, "taxation does amount to regulation."

If the opinion of the Supreme Court of Illinois is permitted to stand, it will open up to the states an entirely new field of taxation and one which has heretofore been

repeatedly protected by this court. Among the many cases in which this court has held the states cannot thus tax interstate commerce are:

Cooney v. *Mountain States Telegraph Co.*, 294 U. S. 384.

Looney v. *Crane*, 245 U. S. 178.

Crew Levick Co. v. *Pennsylvania*, 245 U. S. 292.

Brimmer v. *Rebman*, 138 U. S. 78.

Leloup v. *Port of Mobile*, 127 U. S. 640.

In *Cooney* v. *Mountain States Telegraph Co.*, 294 U. S. 384, Mr. Chief Justice Hughes, speaking for the court, said at page 392:

> "There is no question that the State may require payment of an occupation tax from one engaged in both intra-state and interstate commerce. But a state cannot tax interstate commerce; it cannot lay a tax upon the business which constitutes such commerce or the privilege of engaging in it. And the fact that a portion of a business is intrastate and therefore taxable does not justify a tax either upon the interstate business or upon the whole business without discrimination. *Leloup* v. *Port of Mobile*, 127 U. S. 640."

In *Looney* v. *Crane*, 245 U. S. 178, we find Crane Company was an Illinois corporation which carried on its manufacturing business, not only in Illinois, but in other states by shipment of merchandise on orders obtained from other states. Crane Company had a warehouse in Texas, from which it did an intrastate business in Texas. Texas attempted to tax the interstate business of the Crane Company and contended that the interstate business could be taxed because Crane Company did an intrastate business in Texas. The court said, at page 187:

> "This view can only be sustained upon the assumption that the limitations of the constitution of the United States are not paramount but subordinate to and may be set aside by state authority as a result of the exertion of a local power. . . . But original discussion

is unnecessary since to state the proposition is to demonstrate its want of foundation and because the fundamental error upon which it rests has been conclusively established."

In *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292, the court, in speaking of a mercantile tax measured on the volume of business transacted both in intrastate and interstate commerce, said at page 297:

> "That it applies to internal as well as to foreign commerce cannot save it; for as was said in case of the State Freight Tax 15 Wall. 232, 277, 'The state may tax its internal commerce, but if an act to tax interstate or foreign commerce is unconstitutional, it is not cured by including in its provisions, subjects within the domain of the state.'"

In *Brimmer* v. *Rebman*, 138 U. S. 78, the court said, at page 82:

> "Nor can this statute be brought into harmony with the constitution by the circumstance that it purports to apply alike to citizens of all states including Virginia; for a burden imposed by a state upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to all people of all states including the people of the state enacting such statute."

In *Leloup* v. *Port of Mobile*, 127 U. S. 640, the court said at page 648:

> "No state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce or on the receipts derived from that transportation, *or on the occupation or business of carrying it on*, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress." (Italics supplied by Counsel.)

Since this court in these and many other cases has uniformly held that the commerce clause of the federal con-

stitution prevents the several states from taxing the privilege of doing an interstate business, petitioner respectfully requests this court to grant a writ of certiorari.

II.

The Illinois Supreme Court, in holding that a state may tax a foreign corporation on the privilege or occupation of engaging in interstate commerce, decided a federal question of substance.

While the amount of the disputed portion of the claim of Norton Company in the sum of $96,581.90 is substantial, more important is the fact that, if the opinion of the state court is permitted to stand, it will affect every foreign corporation which also does an intrastate business.

Since this court acts to resolve conflicts in jurisdiction and to settle important principles of law, Norton Company earnestly requests this court to issue a writ of certiorari not only that this particular case may be examined, but also for the guidance of such other state courts as may be in doubt if the opinion involved is permitted to stand or be encouraged to rule as did the Supreme Court of Illinois.

As was said in *Freeman* v. *Hewit* (1947), *supra*, page 251:

> "The power of the States to tax and the limitations upon that power imposed by the Commerce Clause have necessitated a long, continuous process of judicial adjustment. The need for such adjustment is inherent in a federal government like ours, where the same transaction has aspects that may concern the interests and involve the authority of both the central government and of the constituent States."

It is quite apparent the decision of the State Supreme Court is another in a long list of attempts to encroach on the federal power to control interstate commerce.

The federal and state appellate courts, the state legislatures and all others interested in this problem will await the court's opinion on this important attempt of a state to encroach on the federal power over interstate commerce. That it is a matter of substance, there is no doubt. If this latest attempt to encroach on the federal power is permitted to stand a flood of litigation can be expected to follow. This court should again state its thoughts on the subject for the benefit of all those interested in this field.

The fact that this court has permitted states to tax articles which have moved or are about to move in interstate commerce and has permitted ad valorem taxing of property used in interstate commerce, may have encouraged the Supreme Court of Illinois to make this further attempt to control interstate commerce. It would seem that the set of facts herein involved presents a unique opportunity for a decision which would be a guide for all those interested in this problem.

CONCLUSION.

Since the opinion of the Supreme Court of Illinois is contrary to many decisions of this court, a conflict with a decision of the Circuit Court of Appeals for the Seventh Circuit exists, the federal questions involved are matters of substance, the federal constitution is directly involved, and it is the right of this court to resolve these problems, it is respectfully submitted that a writ of certiorari be granted.

Dated this 6th day of June, 1950.

Respectfully submitted,

ROLAND TOWLE,
Counsel for Petitioner.

APPENDIX.

Illinois Retailers' Occupation Tax.

(Chapter 120, Section 440, et seq., Volume 2, Illinois Revised Statutes, 1949, page 778, et seq.)

An Act in relation to a tax upon persons engaged in the business of selling tangible personal property to purchasers or use or consumption. (Approved June 28, 1933, as amended. L. 1933, p. 924.)

Be it enacted by the people of the state of Illinois, represented in the General Assembly:

441. Tax imposed on business of selling tangible personal property at retail.) sec. 2. A tax is imposed upon persons engaged in the business of selling tangible personal property at retail in this State at the rate of three per cent (3%) of the gross receipts from such sales of tangible personal property made in the course of such business prior to July 1, 1941, and two per cent (2%) of ninety-eight per cent (98%) of the gross receipts from such sales after June 30, 1941. However, such tax is not imposed upon the privilege of engaging in any business in interstate commerce or otherwise, which business may not, under the Constitution and statutes of the United States, be made the subject of taxation by this State. As amended by act approved May 29, 1941. L. 1941, vol. 1, p. 1079.

441b. Revocation of certificate of regisration.) Sec. 2b. The Department may, after notice and a hearing as pro-

vided herein, revoke the certificate of registration of any person who violates any of the provisions of this Act. . . .

445. Erroneous payment of tax, penalty or interest—Credit or refund.) Sec. 6. If it shall appear, after claim therefor filed with the Department, that an amount of tax or penalty has been paid which was not due under the provisions of this Act, whether as the result of a mistake of fact or an error of law, except as hereinafter provided, then the Department shall issue a credit memorandum to the person who made the erroneous payment or, in the event that such person shall have died or become incompetent, to such person's legal representative, as such. The amount of such credit memorandum shall be credited against any tax or penalty due or to become due under this Act from the person who made the erroneous payment. If no tax or penalty is due and no proceeding is pending to determine whether such person is indebted to the Department for tax or penalty or either, the credit memorandum so issued may be assigned and set over by the lawful holder thereof, subject to reasonable rules of the Department, to any other person who is subject to the provisions of this Act, and the amount thereof applied by the Department against any tax or penalty due or to become due under this Act from such assignee. * * *

445a. Claims for credit.) Sec. 6a. Claims for credit shall be prepared and filed upon forms provided by the Department. . . . .

445b. Tentative determination of claim—Notice—Hearing—Review.) Sec. 6b. As soon as practicable after a claim for credit is filed the Department shall examine the same and determine the amount of credit to which the claimant or the taxpayer's legal representative, in the event that the taxpayer shall have died or become incompetent, is en-

titled and shall, by its Notice of Tentative Determination of Claim, notify the claimant or his legal representative of such determination, which determination shall be prima facie correct. Proof of such determination by the Department may be made at any hearing before the Department or in any legal proceeding by a photostatic copy of the Department's record relating thereto, in the name of the Department under the certificate of the Director of Revenue. Such photostatic copy shall, without further proof, be admitted into evidence before the Department in any legal proceeding and shall be prima facie proof of the correctness of the Department's determination, as shown therein. If such claimant, or the legal representative of a deceased or incompetent taxpayer, shall within twenty (20) days after the Department's notice of Tentative Determination of Claim, file a protest thereto and request a hearing thereon, the Department shall give notice to such claimant, or the legal representative of a deceased or incompetent taxpayer, of the time and place fixed for such hearing, and shall hold a hearing in conformity with the provisions of this Act, and pursuant thereto shall issue its Final Determination of the amount, if any, found to be due as a result of such hearing, to such claimant, or the legal representative of a deceased or incompetent taxpayer. The Department's Final Determination may be reviewed by the proper Circuit or Superior Court, in the same manner, within the same time, upon the same terms and conditions and to the same extent, as provided by Section 12 of this Act. Appeals from final orders or judgments of such courts shall be taken as in said Section 12 is provided. Added by act approved July 21, 1947. L. 1947, p. 1458.

The Circuit or Superior Court of the County wherein the taxpayer has his principal place of business, or of Sangamon County in those cases where the taxpayer does not have his principal place of business in this State, shall have power to review all final administrative decisions of the Department in administering the provisions of this Act.

Appeals from all final orders and judgments entered by the Circuit or Superior Court upon review of the Department's determination in any case shall be taken directly to the Supreme Court by either party to the proceeding, and shall be governed by the rules applicable to civil cases appealed to said Supreme Court. The remedy herein provided for appeal shall be exclusive.

* * * * *

452. Violations—Penalties.) Sec. 13. Any person engaged in the business of selling tangible personal property at retail in this State who fails to make a return, or to keep books and records as required herein, or who makes a fraudulent return, or who wilfully violates any rule or regulation of the Department for the administration and enforcement of the provisions of this Act, or any officer or agent of a corporation engaged in the business of selling tangible personal property at retail in this State who signed a fraudulent return made on behalf of such corporation, or any itinerant vendor, as herein defined, who after notice fails to file the bond required by Section 12½ of this Act, is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than twenty-five ($25.00) dollars nor more than five thousand ($5,000.00) dollars, or be imprisoned in the county jail for not less than one (1) month nor more than six (6) months, or be both so fined and imprisoned, in the discretion of the court.

Any person who violates any provision of Section 2a of this Act is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than twenty-five ($25.00) dollars nor more than five hundred ($500.00) dollars, or be imprisoned in the county jail not more than six (6) months, or be both so fined and imprisoned, in the discretion of the court. Each and every day any such person engaged in business in violation of said Section 2a shall constitute a separate offense.

453. Title of Act—Tax additional.) Sec. 14. This Act shall be known as the "Retailers' Occupation Tax Act" and the tax herein imposed shall be in addition to all other occupation or privilege taxes imposed by the State of Illinois or by any municipal corporation or political subdivision thereof.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 133

NORTON COMPANY, A CORPORATION,
Petitioner,

vs.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE PETITIONER

ROLAND TOWLE,
MAC ASBILL,
W. A. SUTHERLAND,
JOSEPH B. BRENNAN,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 133

NORTON COMPANY, A CORPORATION,
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vs.
DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE PETITIONER

Opinion Below

The opinion of the Supreme Court of Illinois (R. 95) is reported in 405 Ill. 314, 90 N. E. (2d) 737 (1950).

Jurisdiction

The decision of the Supreme Court of Illinois became final March 20, 1950 (R. 109). The petition for a writ of certiorari was filed June 15, 1950, and was granted October 9, 1950 (R. 110). The jurisdiction of this Court rests on § 1257(3) of Title 28, United States Code, as amended by the Act of June 25, 1948, c. 646, 62 Stat. 929.

Questions Presented

1. Is the Illinois Retailers' Occupation Tax unconstitutional as applied to gross receipts from sales made by petitioner, a Massachusetts corporation, under circumstances where the orders are accepted by petitioner in Massachusetts, the goods are manufactured by petitioner in Massachusetts, and are shipped by petitioner from Massachusetts, f. o. b. Worcester, to customers in Illinois?

2. May the State of Illinois impose its Retailers' Occupation Tax on a Massachusetts corporation for the privilege of doing an interstate business, merely because the Company also does an intrastate business in Illinois upon which it pays such privilege tax to Illinois?

3. Does the Illinois Retailers' Occupation Tax violate the Commerce Clause by discriminating against some interstate sales in favor of others?

Specifications of Error

The Supreme Court of Illinois erred:

1. In declining to follow the principles established by this Court in many cases in which the states have been denied the right to tax the privilege or occupation of engaging in interstate commerce.

2. In holding that the State of Illinois may tax the privilege of engaging in interstate business by a foreign corporation which also did an intrastate business in Illinois upon which it paid a privilege tax levied by that state.

3. In holding that the Illinois Retailers' Occupation Tax Act, now construed as applying to the interstate business of petitioner, is not repugnant to the Commerce Clause of the Federal Constitution.

Statute Involved

The statute involved is the Illinois Retailers' Occupation Tax Act, approved June 28, 1933 (Ill. Laws 1933, p. 924), as amended by the Act of May 29, 1941 (Ill. Laws 1941, Vol. 1, p. 1079; Ill. Rev. Stat. 1941, chap. 120, par. 440 et seq.). Section 2 of the Act, which is directly involved in this case, is as follows:

> "A tax is imposed upon persons engaged in the business of selling tangible personal property at retail in this State at the rate of three per cent (3%) of the gross receipts from such sales of tangible personal property made in the course of such business prior to July 1, 1941, and two per cent (2%) of ninety-eight per cent (98%) of the gross receipts from such sales after June 30, 1941. However, such tax is not imposed upon the privilege of engaging in any business in interstate commerce or otherwise, which business may not, under the Constitution and statutes of the United States be made the subject of taxation by this State."

Other pertinent sections of the Act are set forth in the Appendix hereto.

Statement

Petitioner, a Massachusetts corporation, filed its complaint in the Circuit Court of Sangamon County, Illinois, to review respondent's disallowance of a claim for credit in the amount of $96,581.90, representing taxes collected from petitioner under the Illinois Retailers' Occupation Tax Act with respect to certain sales made by petitioner under circumstances where the orders were accepted by petitioner in Massachusetts, the goods were manufactured by petitioner in Massachusetts, and were shipped by petitioner from Massachusetts, f.o.b. Worcester, Massachusetts, to customers in Illinois (R. 1-3).

In its complaint petitioner alleged that respondent's de-

cision, disallowing the claim, was contrary to the provisions of the Illinois Retailers' Occupation Tax Act and violated the Commerce Clause (Article I, Section 8, Clause 3) of the Constitution of the United States (R. 2). The Circuit Court rendered judgment for respondent (R. 4). On appeal the Supreme Court of Illinois affirmed the judgment (R. 101), holding that the Illinois tax applied to the sales in question, which were admittedly interstate transactions (R. 97), and that as so applied it was constitutional (R. 95-101). The detailed facts are as follows:

Petitioner is incorporated under the laws of Massachusetts. It manufactures and sells grinding wheels, abrasive products and grinding machines. Its plant and main office are at Worcester, Massachusetts (R. 9), where the general ledgers, books, records and invoices are kept and collections are made. It manufactures approximately 225,000 items, and since some items are sold repeatedly, it keeps approximately 18,000 items on hand in its inventory at Worcester (R. 14).

It is authorized as a foreign corporation to do business in the State of Illinois and maintains an office and warehouse in Chicago (R. 9) where it keeps on hand an inventory of approximately 3,000 items (R. 14).

Petitioner does not employ salesmen and has no one soliciting business in Illinois. It does maintain a corps of abrasive engineers who are sent to Illinois to consult with and advise manufacturers, on request, concerning the technical problems the manufacturer may have in the use of grinding wheels and abrasives. These engineers do not solicit orders nor do they take orders (R. 20).

The claim in controversy relates solely to taxes paid on sales of merchandise under orders which were accepted in Massachusetts for goods manufactured in Massachusetts and shipped from Massachusetts to Illinois customers in

interstate commerce. No part of the claim relates to orders accepted in Illinois or to sales made from merchandise in inventory in Illinois (R. 25).

The orders which were the basis of this claim were received by mail, some at Chicago (R. 47) and some at Worcester (R. 73). If received at Chicago they were sent to Worcester for acceptance or rejection. 15 or 20 bags of mail received each day at Worcester brought orders from the 48 states and foreign countries (R. 80). All such orders were accepted or rejected at Worcester and notification was sent from Worcester to the customer. Upon acceptance of an order the articles ordered were either taken from inventory on hand at Worcester or were manufactured to meet specifications. The goods were then shipped from Worcester to the customer.

A complete credit department in charge of an experienced credit manager was maintained at Worcester, which department checked for credit all orders received at Worcester, whether originally sent through Chicago or direct to Worcester. The credit department had full files on each customer which it kept current (R. 73). The Chicago office had only a card list showing the names of persons whose credit Worcester approved, and which was used only in connection with orders which Chicago could fill (R. 47-48).

After an order coming to Worcester was returned from the credit department with credit approved it was then sent to the editing department which determined whether the specifications were sufficient (R. 71). After it was edited it was examined for inventory on hand at Worcester (R. 76). Of the 225,000 different items manufactured, only 18,000 were in inventory (R. 14). If the merchandise was not in inventory, engineers determined whether the article could feasibly be manufactured, whether material was available and when delivery could be made. A manufacturing check

was then prepared containing instructions as to speeds, specifications, size, etc., and instructions were sent to the various departments showing how and when the articles were to be manufactured, when they were to be shipped, and the price and terms at which they were to be billed (R. 76).

As to all of the orders here in question, the goods were shipped from Worcester to the Illinois customers, f.o.b. Worcester, and all invoices so indicated (R. 34). All invoices were sent from Worcester to the Illinois customers. All invoices were payable at Worcester (R. 64). Some of the goods were shipped directly to the customer. Some of the goods were shipped to the customer via the Chicago warehouse, because usually the box cars carrying inventory to the Chicago warehouse were not filled and space was available for additional merchandise. The use of this space for packages addressed to Illinois customers resulted in a saving of transportation costs. The merchandise for the customers was packed and wrapped in boxes or kegs and each package contained on the outside a memorandum showing the name of the customer, the address of the customer and instructions to the Chicago warehouse as to how it was to forward the package to the customers. Upon receipt of such a carload shipment Chicago had no discretion in determining how the packages addressed to the customers were to be delivered. The Chicago warehouse merely forwarded the unopened packages in accordance with the instructions placed on the packages at Worcester (R. 12).

The Chicago office had authority to accept orders only (1) if the merchandise was on hand at Chicago, and, (2) if the customer's name appeared on the approved credit list furnished by Worcester to Chicago (R. 33). If the merchandise was on hand at Chicago and the customer was on the approved credit list which had been furnished by Worcester, the Chicago office accepted the order and delivered the

merchandise and it became an Illinois sale and the Illinois tax was paid thereon. No part of petitioner's claim for credit is based on sales of this kind (R. 25).

If the order could not be accepted at Chicago because the merchandise was not on hand at Chicago or the customer was not on the approved credit list, the Chicago office had no authority to accept or to reject the order. The only authority the Chicago office had with respect to such an order was to forward it to Worcester for acceptance or rejection. Such orders sent to Worcester were sent without recommendation (R. 21).

As to such orders, the Chicago office would not have the necessary information to determine whether the orders could or would be accepted by Worcester. It had no information as to what Worcester had in inventory and did not have the information necessary to determine whether or when Worcester would manufacture articles not in inventory (R. 80).

There were occasions every day when Worcester would reject orders forwarded by the Chicago office because the specifications might not be clear, the merchandise could not be manufactured, or the material was not available, or the safety engineers might not consider the specifications safe, or it would be impractical to manufacture the articles ordered or because of patent requirements as well as for credit reasons (R. 49-50).

In addition to the foregoing, there were orders received at Chicago for merchandise some but not all of which was on hand there. The practice followed was for Chicago to accept the order as to the merchandise on hand and indicate on the order how much of the merchandise it shipped. The balance of the order was then sent to Worcester for acceptance or rejection (R. 34). Upon receipt of such an order at Worcester, it was handled in the same way as other orders received there (R. 64).

Summary of Argument

The Illinois tax is an occupation or privilege tax imposed on the seller for the privilege of selling tangible personal property at retail, and is measured by gross receipts from such sales. As applied in this case the tax was levied on sales made by petitioner, a Massachusetts corporation, pursuant to orders accepted in Massachusetts, where the goods were manufactured by petitioner, and from which state the goods were shipped, f. o. b. Worcester, Massachusetts, to customers in Illinois. The court below recognized that the sales in question were interstate transactions, but upheld the tax on such sales because petitioner also had an office and warehouse in Illinois from which local sales were made. Liability for the tax on such local sales from its Illinois office and warehouse was admitted and is not in issue here, but petitioner contends that the Illinois tax cannot be validly levied upon the interstate sales which were separate and distinct from the local sales made in Illinois.

Under this Court's decision in *McLeod* v. *J. E. Dilworth Co.*, 322 U. S. 327 (1944), the Illinois tax is clearly invalid as applied to petitioner's sales which were consummated in Massachusetts, even though the goods were shipped to customers in Illinois. The fact that petitioner had an office and warehouse in Illinois from which it did an intrastate business is constitutionally irrelevant to the power of Illinois to tax the separate and distinct sales which admittedly constituted interstate transactions. The state may tax the local business but it cannot measure such tax by unapportioned gross receipts from interstate commerce.

Whether the Commerce Clause creates an area of free trade which immunizes interstate transactions from direct taxation by the states, or whether it simply prevents the risk of multiple state taxes on the same interstate transac-

tions, it must be abundantly clear that a tax like the Illinois tax, which is both a direct tax on interstate transactions and may be duplicated by several states, is unconstitutional. The tax here is laid on the transaction of sale itself, not upon some local incident that precedes or follows the sale; and it is applied to the unapportioned gross receipts from such interstate sale. And the tax is of such a nature that if the identical tax should be imposed in another state, interstate sales between Illinois and such other state would be subjected to twice the sales tax burden that intrastate sales would bear.

The Illinois tax cannot be justified as the substantial equivalent of a use tax. The tax is imposed upon the seller, who is not required or authorized to collect the tax from the buyer. In its nature, operation and effect, the Illinois tax is substantially different from a use tax and cannot be sustained upon the constitutional principles applied in the use tax cases. The present case is also distinguishable from other cases where state taxes have been upheld as applied to local activities or incidents related to interstate sales.

As the statute is construed by the court below, the Illinois tax does not apply to sales made by an out-of-state seller to Illinois customers in cases where the seller has no place of business in Illinois. The tax therefore discriminates against some interstate transactions in favor of others, of the very same nature. Such discrimination itself amounts to a regulation of interstate commerce and provides an additional ground for holding the Illinois tax unconstitutional.

ARGUMENT

I

The Illinois Retailers' Occupation Tax is imposed upon the seller for the privilege of engaging in the business of making retail sales, which in this case are admittedly interstate transactions, and is measured by unapportioned gross receipts from such sales.

The Illinois Retailers' Occupation Tax is "imposed upon persons engaged in the business of selling tangible personal property at retail in this state at the rate of * * * two per cent (2%) of ninety-eight per cent (98%) of the gross receipts from such sales". The tax is imposed on the seller; the seller is not authorized or required to collect the tax from the buyer; and no duty rests on the buyer to pay the tax. *People's Drug Shop, Inc.* v. *Moysey*, 384 Ill. 283, 51 N. E. (2d) 144 (1943).

The Supreme Court of Illinois has construed the Act as imposing "an occupation tax upon a class of vendors * * * measured by the gross receipts from their sales". *People's Drug Shop, Inc.* v. *Moysey, supra.* That court has also described the tax as "a tax on the privilege of engaging in the business of selling tangible personal property to purchasers for use or consumption". *People ex rel. Herlihy Mid-Continent Co.* v. *Nudelman*, 370 Ill. 237, 18 N. E. (2d) 225 (1938).

The qualifying words "in this state" as used in the section imposing the tax have been construed by the Supreme Court of Illinois as referring to the location of the "occupation" which is taxed rather than to the place where the taxable sales occur. *Standard Oil Co.* v. *Department of Finance*, 383 Ill. 136, 48 N. E. (2d) 514 (1943). If an occupation of selling at retail is carried on within the state, the tax is "to be measured upon the gross receipts of all sales

regardless of where the sales were made, provided they were made in the business of an occupation located within this state." *Standard Oil Co.* v. *Department of Finance*, 383 Ill. at 143.

As construed by the Supreme Court of Illinois the tax does not apply to sales made by an out-of-state seller, where the goods are shipped to a buyer in Illinois and where the seller has no place of business in Illinois. *Ex-Cell-O Corp.* v. *McKibbin*, 383 Ill. 316, 50 N. E. (2d) 505 (1943); *Ayrshire Patoka Collieries Corp.* v. *Nudelman*, 383 Ill. 345, 50 N. E. (2d) 509 (1943). Nor is the tax applied to the case of an out-of-state seller who ships goods to customers in Illinois, even if the seller has Illinois sales offices through which orders are solicited. *Allis-Chalmers Mfg. Co.* v. *Wright*, 383 Ill. 363, 50 N. E. (2d) 508 (1943).[1]

As the Act is construed and applied by the court below in the present case, petitioner, a Massachusetts corporation, which has an office and warehouse in Illinois, from which local sales are made, is subject to the tax not only with respect to sales made from such local office and warehouse but also with respect to separate and distinct interstate sales. In the case of such interstate sales, the orders were accepted by petitioner in Massachusetts, the goods were manufactured by petitioner in Massachusetts and were shipped from Massachusetts, f.o.b. Worcester, to purchasers in Illinois. The court below recognized that such sales were interstate transactions, saying that "There is no doubt that we are dealing with interstate commerce in the present case" (R. 97), but it held nevertheless that the Illinois

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[1] In the present case the court below assumed that the only activity of the local offices in the *Allis-Chalmers* case was the solicitation of orders in Illinois (R. 99). Actually, it appears from the opinion in the *Allis-Chalmers* case that the company had paid taxes on local sales in Illinois, which were not in dispute. 383 Ill. at 364, 50 N. E. (2d) at 508.

Retailers' Occupation Tax upon petitioner could be validly measured by the entire gross receipts from such interstate commerce.

II

The Illinois tax is clearly invalid under this Court's decision in McLeod v. Dilworth.

An occupation tax imposed on the seller and measured by gross receipts from interstate sales can be no stronger, constitutionally, than a tax levied in so many words directly upon such sales. In cases where occupation taxes have been measured by unapportioned gross receipts from interstate commerce, this Court has considered such taxes invalid as direct taxes on such commerce. *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292 (1917); *Fisher's Blend Station, Inc.* v. *State Tax Commission*, 297 U. S. 650 (1936); *Gwin, White & Prince* v. *Henneford*, 305 U. S. 434 (1939).

Although the states have been permitted to levy use taxes[2] and sales taxes[3] in connection with certain local aspects of interstate sales, it has been the uniform doctrine of this Court that a state tax upon an interstate sale itself, as distinguished from some local incident of the sale, is unconstitutional. *Crew Levick Co.* v. *Pennsylvania*, *supra*; *J. D. Adams Manufacturing Co.* v. *Storen*, 304 U. S. 307 (1938); *Gwin, White & Prince* v. *Henneford*, *supra*; *McLeod* v. *J. E. Dilworth Co.*, 322 U. S. 327 (1944); *Freeman* v. *Hewit*, 329 U. S. 249 (1946). See *Sonneborn Brothers* v. *Cureton*, 262 U. S. 506, 515 (1923). This was emphasized in *McLeod* v. *Dilworth*, where this Court held an Arkansas sales tax invalid as applied to sales, made by a seller in

[2] See proposition IV, *infra*, where the use tax cases are discussed and distinguished.

[3] *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33 (1940), and similar cases are discussed and distinguished under proposition V, *infra*.

Tennessee, of goods shipped to customers in Arkansas. The decision in the *Dilworth* case is clearly controlling here.

In *McLeod* v. *Dilworth*, *supra*, a seller in Tennessee sent solicitors into Arkansas to solicit orders for goods from Arkansas buyers. The solicitors had no authority to accept any orders but were required to forward them to the home office in Tennessee where they were accepted or rejected. When an order was accepted, the goods were shipped to the buyers in Arkansas, f.o.b. Memphis, Tennessee. This Court held that the Arkansas sales tax could not be constitutionally levied on these sales, because the sales took place outside of Arkansas and such a tax would, therefore, be an unconstitutional burden on interstate commerce.

In the *Dilworth* case, this Court said that the Arkansas tax imposed an unconstitutional burden on interstate commerce because it sought to reach sales "consummated in Tennessee for the delivery of goods in Arkansas". Addressing itself to this point the Court said:

> "Orders for goods come to Tennessee through solicitation in Arkansas by travelling salesmen domiciled in Tennessee, by mail or telephone. But no matter how an order is placed it requires acceptance by the Memphis office, and on approval the goods are shipped from Tennessee. Title passes upon delivery to the carrier in Memphis, and collection of the sales price is not made in Arkansas. In short we are here concerned with sales made by Tennessee vendors that are consummated in Tennessee for the delivery of goods in Arkansas." 322 U. S. at 328.

These are the precise facts of the instant case. All orders for the Massachusetts sales of the Norton Company were accepted by the petitioner in Massachusetts. Title passed upon delivery of the goods to the carrier f.o.b. Worcester, Massachusetts, and all billing and collection of the purchase price was done at Worcester, Massachusetts. In

short, paraphrasing the words of the Court in the *Dilworth* case, "we are here concerned with sales made by a Massachusetts vendor that are consummated in Massachusetts for the delivery of goods in Illinois".

There are two possible distinctions between the *Dilworth* case and the case at bar. One of the factual differences between the cases furnishes an additional argument against the Illinois tax in the present case and makes the present case a stronger one against the Illinois tax, than the facts of the *Dilworth* case afforded against the Arkansas tax. The other factual difference is legally irrelevant—a difference but not a legal distinction.

In the *Dilworth* case the seller sent solicitors into Arkansas to solicit sales. In the present case the court below has found as a fact that petitioner had no salesmen in Illinois and solicited no sales there (R. 95-96). There is, therefore, an even more remote connection between the Massachusetts sales and the tax imposed by Illinois in the present case than there was between the Tennessee sales and the Arkansas tax in the *Dilworth* case.

In the *Dilworth* case the seller sent solicitors into Arkansas to solicit orders for sales. The seller did not, however, have a local office in Arkansas, while petitioner does maintain a local office in Illinois. This factual difference is legally irrelevant. The local office in Illinois was engaged solely in making local sales to Illinois buyers as to which petitioner has paid the Illinois tax and raises no constitutional question. It is true that in some cases orders for the Massachusetts sales were routed through the Illinois office. However, the Illinois office had no authority to accept or reject such orders; it acted as a purely passive conduit for transmitting these orders to the home office in Massachusetts, where they were accepted or rejected. (R. 9)

Any possible distinction between the *Dilworth* case and the case at bar, upon the ground that petitioner had a local

office in Illinois, is clearly negatived by the cases holding that the fact that a corporation does an intrastate business in a state affords no justification for taxing its interstate business. In *Cooney* v. *Mountain States Telegraph Co.*, 294 U. S. 384 (1935), Mr. Chief Justice Hughes, speaking for the Court, said (at p. 392):

> "There is no question that the State may require payment of an occupation tax from one engaged in both intrastate and interstate commerce. But a State cannot tax interstate commerce; it cannot lay a tax upon the business which constitutes such commerce or the privilege of engaging in it. And the fact that a portion of a business is intrastate and therefore taxable does not justify a tax either upon the interstate business or upon the whole business without discrimination."

See also *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1 (1910); *Cudahy Packing Company* v. *Hinkle*, 278 U. S. 460 (1929); *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292 (1917) (involving an annual mercantile license tax measured by a percentage of gross receipts, held invalid as applied to the receipts of a firm engaged in local, intrastate commerce as well as interstate or foreign commerce).[4]

It is true that in *Felt and Tarrant Manufacturing Co.* v. *Gallagher*, 306 U. S. 62 (1939); *Nelson* v. *Sears Roebuck &*

[4] Following this Court's decision in the *Dilworth* case, the Arkansas Supreme Court had to consider a question as to the validity of the Arkansas sales tax as applied to sales made by a Louisiana branch of an Arkansas firm to customers in Arkansas under circumstances where the orders were accepted at the Louisiana branch and shipped from there to customers in Arkansas. Although the seller's principal place of business was in Arkansas and it did an extensive intrastate business in Arkansas, from its Arkansas stores, the sales made by the Louisiana branch to Arkansas customers were held not taxable. *State ex rel. Commissioner of Revenue* v. *Hollis & Company*, 209 Ark. 455, 190 S. W. (2d) 986 (1945). The court recognized that the case was ruled by this Court's decision in the *Dilworth* case.

Company, 312 U. S. 359 (1941); and *Nelson* v. *Montgomery Ward*, 312 U. S. 373 (1941), this Court held that a state could require an out-of-state seller to collect and remit to the state a *use* tax[5] in connection with goods sold to buyers within the taxing state, and in these cases the seller had a local agent in the taxing state. However, the Court has made it clear that the presence of a local agent within the state had nothing to do with the matter. Thus, in the case of *General Trading Company* v. *State Tax Commission*, 322 U. S. 335 (1944), the Court sustained the imposition of that kind of obligation on a seller who had no local office within the taxing state and the Court was very careful to point out explicitly that the presence of a local office had nothing to do with the legality of the tax. The Court said (at p. 338):

> "And the fact that in the *Sears Roebuck* and *Montgomery Ward* cases the interstate vendor also had retail stores in Iowa, whose sales were appropriately subjected to the sales tax, is constitutionally irrelevant to the right of Iowa sustained in those cases to exact a use tax from purchasers on mail order goods forwarded into Iowa from without the state."

III

The Illinois tax is unconstitutional because it is a direct tax upon unapportioned gross receipts from interstate commerce and also because it subjects such commerce to the threat of multiple state taxation.

Whether the Commerce Clause inhibits a state from imposing a direct tax upon interstate sales [*Freeman* v. *Hewit*, 329 U. S. 249 (1946); *McLeod* v. *J. E. Dilworth Company*, 322 U. S. 327 (1944)] or whether it simply protects such sales from the risk of multiple state taxes on the same

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[5] The differences between a use tax and a sales tax are discussed under proposition IV, *infra*.

transaction [*J. D. Adams Manufacturing Co.* v. *Storen*, 304 U. S. 307 (1938)], it is abundantly clear that a state tax which is both a direct tax upon an interstate sale and subject to duplication by other states is unconstitutional. Since the Illinois tax here in question is both, it is clearly unconstitutional.

Recent decisions of this Court have emphasized and reiterated the basic principle "that the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the states, but by its own force created an area of trade free from interference by the States". *Freeman* v. *Hewit*, 329 U. S. at 252. See also *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U. S. 422, 433 (1947); *McLeod* v. *J. E. Dilworth Company*, 322 U. S. at 330-331; *Puget Sound Stevedoring Co.* v. *Tax Commission of the State of Washington*, 302 U. S. 90, 94 (1937). Applying this principle in *Freeman* v. *Hewit*, this Court held invalid, as a direct tax upon interstate commerce, a state gross receipts tax as applied to the proceeds of an interstate sale. The Court said (at p. 287): "The tax on the sale itself cannot be differentiated from a direct unapportioned tax on gross receipts which has been definitely held beyond the state taxing power ever since *Fargo* v. *Michigan*, 121 U. S. 230, and *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U. S. 326."

In holding the tax invalid in *Freeman* v. *Hewit*, the Court pointed out that such an impediment on interstate commerce could not be justified either on the ground that the tax is applied without discrimination to local sales within the taxing state as well as to interstate sales, or upon the ground that multiple state taxation is not involved. With reference to the non-discriminatory nature of the tax in that

case, the Court said that a state "cannot justify what amounts to a levy upon the very process of commerce across state lines by pointing to a similar hobble on its local trade." 329 U. S. at 254. The Court recognized that in order to make interstate commerce pay its way the states are permitted to impose other kinds of taxes, "apart from taxing the very sale", and it explained that such permitted taxes "are not, as would be a tax on gross receipts, a direct imposition on that very freedom of commercial flow which for more than a hundred and fifty years has been the ward of the Commerce Clause." 329 U. S. at 256.[6]

In some cases the Court has held state taxes invalid under the Commerce Clause, because the taxes were of such a nature as to subject interstate transactions to the risk of multiple taxation by every state which such commerce touches. *Gwin, White & Prince* v. *Henneford*, 305 U. S. 434 (1939); *J. D. Adams Manufacturing Co.* v. *Storen*, 304 U. S. 307 (1938); *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938). In applying this principle as a basis for holding a state tax on interstate sales invalid, in

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[6] The Court relied on *Freeman* v. *Hewit* in the later case of *Central Greyhound Lines* v. *Mealey*, 334 U. S. 653, 663 (1948), where a state tax was held invalid as applied to *unapportioned* gross receipts from interstate transportation. In that case it was recognized that the tax might be upheld if *fairly apportioned* (as on a mileage basis) to receipts from business done within the state. Compare *Interstate Oil Pope Line Co.* v. *Stone*, 337 U. S. 662 (1949), involving a state tax measured by the gross receipts from the operation of a pipe line wholly within the state. Four justices held the tax valid, even though the transportation was considered a part of interstate commerce, because there was no attempt to tax activities outside the state and no other state could repeat the tax. One Justice concurred solely on the ground that the transportation involved was intrastate commerce. Four Justices dissented on the ground that the tax was invalid as a direct tax on interstate commerce, even though the taxable receipts were derived from transportation wholly within the state.

J. D. Adams Manufacturing Co. v. Storen, supra, this Court said:

> "The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by states in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids." 304 U. S. at 311.

In cases applying the multiple tax principle, it is clear that the actual existence of a similar tax in other states which such commerce touches need not be shown in order to invalidate the tax. "Unlawfulness of the burden depends upon its nature, measured in terms of its capacity to obstruct interstate commerce, and not on the contingency that some other state may first have subjected the commerce to a like burden." *Gwin, White & Prince* v. *Henneford*, 305 U. S. at 440. And cf. *Freeman* v. *Hewit*, 329 U. S. at 256.

That the Illinois tax as applied in this case is a direct tax on interstate commerce should require no argument. The tax is levied on sales that are admittedly interstate transactions (R. 97) and is measured by gross receipts from such interstate sales. Moreover, the tax is imposed upon the occupation of making interstate sales, that is, it is a levy exacted for the very privilege of engaging in interstate commerce.

The Illinois tax clearly involves the danger of multiple taxation. Since the statute was amended in 1941, the Supreme Court of Illinois has held that it applies to "all sales regardless of where the sales were made." See the explanation under proposition I, *supra*. No explicit provision in the

Illinois statute confines the tax to an intrastate incident of an interstate sale susceptible to taxation by Illinois alone. Nor does the construction of the statute by the Illinois court impose such a limitation. The tax is measured by the gross receipts from interstate sales and there is no attempt to apportion the tax to any activities in Illinois. Nor, as the present case demonstrated, does the tax actually depend on a local incident of an interstate sale since all the essential elements of the interstate sales in question occurred outside of Illinois. If Illinois can tax sales which are entirely consummated outside of Illinois like the Massachusetts sales of petitioner in this case, it is evident that the state where the sales took place may also tax them.

Viewed as an occupation tax, the Illinois tax presents perhaps even greater possibilities for multiple taxation. Although the Supreme Court of Illinois, in speaking of the 1941 amendment, which removed the limitation in the statute which had limited the tax to sales made in Illinois, said that the tax was "to be measured upon the gross receipts of all sales regardless of where the sales were made, provided that they were made in the business of an occupation located within this State",[7] it seems clear from the way in which the court below applied the statute in the present case that the proviso is no real limitation at all. It would seem from the opinion of the Court in *Standard Oil Co.* v. *Department of Finance*, *supra*, that it could not possibly have construed its statute as applying to the Massachusetts sales of the petitioner here, since such sales were in no way related to the occupation of making local sales carried on by petitioner in Illinois. However, the Illinois Supreme Court did construe its law to permit an occupation tax on sales actually made in another state. If Illinois can impose a tax on the

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[7] *Standard Oil Co.* v. *Department of Finance*, 383 Ill. 136, 143, 48 N. E. (2d) 514, 517 (1943).

occupation of making sales in Massachusetts, surely Massachusetts, where the occupation of making these sales is actually carried on, can impose a tax on the same transaction.

IV

The Illinois tax cannot be sustained as the substantial equivalent of a use tax.

The court below relied to some extent upon decisions in which this Court sustained the validity of the Iowa use tax as applied to goods purchased by Iowa buyers from out-of-state sources, and further upheld a provision of the Iowa statute requiring the out-of-state seller to collect the use tax from the buyer and remit to the State of Iowa. *Nelson* v. *Sears, Roebuck & Company*, 312 U. S. 359 (1941); *Nelson* v. *Montgomery Ward*, 312 U. S. 373 (1941); *General Trading Company* v. *State Tax Commission*, 322 U. S. 335 (1944). And it is only fair to point out that some of the Justices dissented from the decision in *McLeod* v. *Dilworth*, 322 U. S. 327 (1944), on the ground that a use tax could have been imposed by Arkansas (the buyer's state) under the facts disclosed in that case, and that since there was no substantial difference between the practical operation of a use tax and the Arkansas sales tax, the Arkansas tax should have been sustained. In the opinion of the Court in the *Dilworth* case it was said, however, that the "answer [to the contention] is that Arkansas has chosen not to impose such a use tax." 322 U. S. at 330. The Court continued:

> "A sales tax and a use tax in many instances may bring about the same result. But they are different in conception, are assessments on different transactions and in the interlacings of the two legislative authorities within our federation may have to justify themselves on different constitutional grounds. * * *"

In the present case there is no doubt that Illinois has deliberately chosen a tax imposed upon the seller on account of its occupation of making sales, and not a use tax imposed upon the buyer on account of use within the State of Illinois. Not only does the Illinois statute impose the tax upon the seller with reference to the transaction of sale, which in this case is interstate, but it does not require or authorize the seller to collect the tax from the buyer, and no duty is imposed upon the buyer to pay the tax to the seller or to the state. *People's Drug Shop, Inc.* v. *Moysey*, 384 Ill. 283, 51 N. E. (2d) 144 (1943). The practical situation is entirely different from what it would be if a use tax were involved. Moreover, the difference between a sales tax and a use tax goes deeper than the legal incidence of the tax since the two taxes may have a different effect on interstate commerce.

If Illinois had chosen to supplement its Retailers' Occupation Tax with a use tax, the use tax would be imposed with respect to goods which compete with petitioner's products and which are sold to Illinois purchasers by petitioner's competitors who have no place of business in Illinois and who escape payment of the Retailers' Occupation Tax.[8] At least in that situation petitioner would not be subject to the burdensome discrimination against it and in favor of such competitors.[9] Moreover, the actual burden of a use tax would have a greater tendency to fall on the purchaser than would an occupation or sales tax imposed on the seller. The record here shows that petitioner actually absorbed the Illinois tax and did not pass it on or shift the burden to its Illinois customers (R. 11-13). "The prices charged an Illinois customer were the same as those charged to customers in other states for the same article at the same time"

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[8] An Illinois use tax, but not the Illinois sales tax, would also fall upon goods purchased outside the state which Illinois purchasers would themselves bring into Illinois for use there.

[9] See the discussion under proposition VI, *infra*.

(R. 12-13). If Illinois law imposed a use tax on Illinois purchasers and required the seller to collect it as agent for the state, the additional charge for the tax would be less likely to meet with customer resistance than would be the case if the seller tried to shift the burden of an occupation or sales tax imposed upon him, by charging Illinois customers more than the price it charges customers in other states. That is particularly true in a situation like the present where petitioner's competitors, who have no place of business in Illinois, do not have to pay the Illinois tax on sales to their Illinois customers.[10] It is manifest that the Illinois tax is not the substantial equivalent of a use tax.

V

The Berwind-White and similar cases are distinguishable.

In the court below respondent relied heavily upon the decision of this Court in *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33 (1940). In that case this Court upheld the validity of a New York City "sales tax" as applied to sales of coal which the seller mined in Pennsylvania and shipped across New Jersey for delivery to buyers in New York City. In the case of all sales as to which the New York tax was sustained, the sales contracts were entered into in New York City and deliveries were made within New York City. 309 U. S. at 44. The tax in question was laid "upon purchasers for consumption of tangible personal property." 309 U. S. at 42. The tax was fixed at "two per centum upon the amount of the receipts from every sale in the City of New York," "sale" being defined in the Act as "any transfer of title or possession, or both * * * for a considera-

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[10] *Ex-Cell-O Corp.* v. *McKibbin*, 383 Ill. 316, 50 N. E. (2d) 505 (1943); *Ayrshire Patoka Collieries Corp.* v. *Nudelman*, 383 Ill. 345, 50 N. E. (2d) 509 (1943); *Allis-Chalmers Mfg. Co.* v. *Wright*, 383 Ill. 363, 50 N.E. (2d) 508 (1943).

tion * * *." The taxing Act provided that the tax "shall be paid by the purchaser to the vendor for or on account of the City." 309 U. S. at 42-43. It required the vendor to charge the tax to the purchaser separately from the sales price and it made the vendor liable, as an insurer, for payment to the City. In the event of non-payment to the seller, the Act required the buyer to file a return and pay the tax to the City Comptroller.

This Court held that the tax involved in that case was not invalid under the Commerce Clause because it was "conditioned upon events occurring within the state, either transfer of title or possession of the purchased property, or an agreement within the state, 'consummated' there, for the transfer of title, or possession." 309 U. S. at 43-44. The Court considered that the taxable event under the Act was "delivery of goods within the state upon their purchase for consumption," and that this was a "local activity," which occurred after the interstate journey had ended. 309 U. S. at 49, 58.

As pointed out before, the Illinois tax is imposed upon the seller and not the buyer.[11] Nor does the statute specify as the taxable event some local activity occurring within Illinois. The provision originally limiting the tax to sales occurring within the state was removed by amendment in 1941. *Standard Oil Co.* v. *Department of Finance, supra.* As construed and applied by the Supreme Court of Illinois in the case at bar, the statute imposes a tax on sales occurring in Massachusetts, under circumstances where orders were received and accepted in Massachusetts, the goods were shipped f.o.b. Worcester, Massachusetts, so that title passed

[11] The Bureau of Internal Revenue recognizes that the Illinois tax is imposed on the seller (I.T. 2783, XIII-1 C.B. 54), and that the New York tax involved in *Berwind-White* is imposed on the purchaser (I.T. 2902, XIV-2 C.B. 67), with a resulting difference in treatment under the Federal income tax law.

in Massachusetts, and the goods were delivered to the carrier on behalf of the buyer in Massachusetts.

The principle of the *Berwind-White* case is limited to the situation involving an entirely different kind of tax—a tax on the purchaser for consumption—and to the situation where the taxable event specified in the taxing Act is a local activity occurring within the taxable state after interstate commerce has ended. It has never been applied to a tax on sales, measured by the gross selling price, where all of the essential elements of the sale occurred outside the taxing state although the goods were shipped into the taxing state pursuant to the contract of sale. *McLeod* v. *J. E. Dilworth Co.*, 322 U. S. 327.[12]

The limitations on the *Berwind-White* case are clearly shown by the cases involving the application of the Indiana Gross Income Tax to gross receipts from interstate sales. In *Freeman* v. *Hewit*, 329 U. S. 249 (1946), an Indiana resident sold securities through a broker in New York. This Court held that the Indiana tax could not be applied constitutionally to the receipts from the sale because it impinged upon the interstate sale itself and was not limited to any local intrastate incident of the sale. In a similar situation the same result was reached in *J. D. Adams Manufacturing Co.* v. *Storen*, 304 U. S. 307 (1938). On the other hand, in *Department of Revenue* v. *Wood Preserving Co.*, 313 U. S. 62 (1941), and *International Harvester Co.* v. *Department of Treasury*, 322 U. S. 340 (1944), it was held that the income from the sales involved in these cases was taxable because

[12] In the *Dilworth* case this Court distinguished the *Berwind-White* case and the two cases decided together with *Berwind-White*, viz., *McGoldrick* v. *Felt and Tarrant Manufacturing Co.* and *McGoldrick* v. *A. H. DuGrenier, Inc.*, 309 U. S. 70. The Court said that the decision in *Berwind-White* controlled the two other cases because the relevant factors were the same. 322 U. S. at 329. *Berwind-White* was also distinguished in *Freeman* v. *Hewit*, 329 U. S. at 257.

the tax impinged on local intrastate activities which occurred in Indiana, such for example as the consummation of the contract of sale in Indiana, delivery to the buyer in Indiana and passage of title to the goods in Indiana. Where, however, the tax is imposed directly upon an interstate sale and not upon some local intrastate transaction it is unconstitutional whether it is imposed by the seller's state (*Freeman* v. *Hewit, supra*) or the buyer's state (*McLeod* v. *Dilworth, supra*).

Since the present case is clearly distinguishable from the *Berwind-White* and similar cases, it seems unnecessary to discuss such cases at greater length. But it does seem appropriate at this point to restate certain fundamental principles as to which there is no disagreement, although in some of the cases referred to under this heading, these principles may not have been considered as fully as they should have been in relation to the facts presented.

Under the Federal Constitution a state is free, *after* interstate property has come to rest in the state, to impose upon it any burden which it imposes on property originating within the state. On such property the state may impose a property tax, a use tax, a sales tax or any other burden. This is a corollary of the principle that the state where the property is produced and from which it is sold may impose any sort of tax it wishes to impose *before* the property ceases to be a part of the mass of property in the seller's state and takes on interstate implications. To maintain a proper balance between the rights of the states in local matters and the constitutional guarantee of freedom of interstate commerce, great care must be exercised by this Court to see that, at each end of an interstate transaction, the incidents which are local and disconnected from the interstate commerce be carefully distinguished from those which are essentially an integral part of such commerce. The task is not always a simple

one and sometimes fine lines must be drawn to make certain that what purports to affect only a local activity is not actually a regulation of interstate commerce. If the Court is not careful in drawing such lines, no proper division is possible between what is and what is not permitted to the state. If merely because an integral phase of an interstate transaction takes place within a state that state is permitted to regulate it as though it were not a part of the interstate transaction, the whole concept of freedom of interstate commerce from state interference becomes meaningless.[13]

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[13] It is clear from the opinion in *Nippert* v. *Richmond*, 327 U. S. 416 (1946), that the Court realizes that if any wide scope be given to the concept justifying a tax because it is on some local incident of an interstate transaction, freedom of such commerce from state interference will be wholly destroyed. Mr. Justice Rutledge, speaking for the Court, said (at p. 423):

> "If the only thing necessary to sustain a state tax bearing upon interstate commerce were to discover some local incident which might be regarded as separate and distinct from 'the transportation or intercourse which is' the commerce itself and then to lay the tax on that incident, all interstate commerce could be subjected to state taxation and without regard to the substantial economic effects of the tax upon the commerce. For the situation is difficult to think of in which some incident of an interstate transaction taking place within a state could not be segregated by an act of mental gymnastics and made the fulcrum of the tax. All interstate commerce takes place within the confines of the states and necessarily involves 'incidents' occurring within each state through which it passes or with which it is connected in fact. And there is no known limit to the human mind's capacity to carve out from what is an entire or integral economic process particular phases or incidents, label them as 'separate and distinct' or 'local,' and thus achieve its desired result."

VI

The Illinois taxing act is unconstitutional for the further reason that it attempts to regulate interstate commerce by discriminating against some interstate sales in favor of others.

The Supreme Court of Illinois has construed the Retailers' Occupation Tax Act as *not* requiring a tax on interstate sales made by out-of-state sellers to Illinois customers where such sellers have no local office in Illinois. *Ex-Cell-O Corp.* v. *McKibbin*, 383 Ill. 316; *Ayrshire Patoka Collieries Corp.* v. *Nudelman*, 383 Ill. 345.[14] These cases were distinguished by the court below in the present case and the tax was held to apply to interstate sales made by petitioner, since petitioner did maintain a local office and warehouse in Illinois, even though the interstate sales in question were separate and distinct from the local business handled by the Illinois office and warehouse. The effect of the Act as thus construed is to discriminate against one type of interstate commerce in favor of another without any rational basis for the discrimination.

Generally cases of discrimination by a state against interstate commerce have been presented in situations where the discrimination was against interstate commerce and in favor of local commerce. Such discrimination has been uniformly held to be bad. Cf. *Nippert* v. *Richmond*, 327

[14] At the same time the Court held the tax inapplicable to sales made by an out-of-state seller to Illinois customers under circumstances where the seller maintained two sales offices in Illinois, through which orders were solicited, and where the seller also made some local sales on which it admitted its liability for the tax. *Allis-Chalmers Mfg. Co.* v. *Wright*, 383 Ill. 363. Although the court below attempted to distinguish the *Allis-Chalmers* case from the case at bar, it did so upon the assumption that the only local activity of the Allis-Chalmers Co. was the solicitation of orders through its sales offices in Illinois. It is difficult to reconcile the actual result in the *Allis-Chalmers* case with the decision in the present case.

U. S. 416 (1946). Whatever may be the rule where a mere burden is placed on interstate commerce, if it is apparent that state action produces discrimination against interstate commerce in favor of local commerce, no further inquiry is necessary to determine the invalidity of the state action. Such discriminatory action unquestionably constitutes a prohibited regulation of such commerce under the Federal Constitution and there has been no tendency on the part of the courts to sustain such action.

On the basis of the principles underlying these decisions, it must be clear beyond question that it is equally a violation of the Commerce Clause for a state to discriminate in favor of some interstate sales against other interstate sales. The type of such possible discriminations which first comes to mind is discrimination in favor of goods coming in from one state as compared with goods coming from another. But it should be just as clear that a state cannot constitutionally discriminate against interstate sales made by persons having an office in the state as compared with the same kind of sales made in the same manner by one not having an office in the state and vice versa. If any local incident of any interstate sale, as, for example, the making of delivery within the state, should be held to be taxable by the state, it should be clear that the state should not be free under the commerce clause to tax such incident of one interstate sale and not to tax the same incident of another such sale. If it were necessary as some members of the Court have felt, to permit a tax on local incidents of an interstate sale in order to make sure that interstate commerce pays its way, that would certainly afford no basis for sustaining a state tax which discriminates against portions of interstate commerce by taxing one portion and permitting another portion to remain free of the tax, as does the Illinois tax here in question.

Conclusion

There can be no doubt that upon the authority of this Court's decisions, the Illinois tax as applied here is unconstitutional, as a direct burden on interstate commerce itself, since it is measured by unapportioned gross receipts from such commerce, and is also of such a nature as to be susceptible of multiplication by other states, with the result that it subjects such commerce to the risk of a cumulative burden that intrastate commerce does not bear. This Court's decision in *McLeod* v. *Dilworth* is definite and clear authority for the invalidity of this tax. In order to sustain the Illinois tax here, the Court would not only have to overrule the *Dilworth* case, but it would have to repudiate the basic reasoning of all the cases on the taxation of interstate sales. Moreover, the Illinois statute as construed and administered is unconstitutional because it discriminates against some interstate sales in favor of others. It is submitted that the decision of the Supreme Court of Illinois is erroneous and should be reversed.

Respectfully submitted,

ROLAND TOWLE,
111 W. Washington St.,
Chicago 2, Illinois;
MAC ASBILL,
W. A. SUTHERLAND,
JOSEPH B. BRENNAN,
Ring Building,
Washington 6, D. C.,
Counsel for Petitioner.

APPENDIX

ILLINOIS RETAILERS' OCCUPATION TAX

(Ill. Rev. Stat. 1949, chap. 120, par. 440 et seq., Vol. 2, p. 778)

An Act in relation to a tax upon persons engaged in the business of selling tangible personal property to purchasers for use or consumption. (Approved June 28, 1933, as amended. L. 1933, p. 924.)

Be it enacted by the people of the state of Illinois, represented in the General Assembly:

441. Tax imposed on business of selling tangible personal property at retail. Sec. 2. A tax is imposed upon persons engaged in the business of selling tangible personal property at retail in this State at the rate of three per cent (3%) of the gross receipts from such sales of tangible personal property made in the course of such business prior to July 1, 1941, and two per cent (2%) of ninety-eight per cent (98%) of the gross receipts from such sales after June 30, 1941. However, such tax is not imposed upon the privilege of engaging in any business in interstate commerce or otherwise, which business may not, under the Constitution and statutes of the United States, be made the subject of taxation by this State. As amended by act approved May 29, 1941. L. 1941, Vol. 1, p. 1079.

441b. Revocation of certificate of registration. Sec. 2b. The Department may, after notice and a hearing as provided herein, revoke the certificate of registration of any person who violates any of the provisions of this Act. . . .

445. Erroneous payment of tax, penalty or interest—Credit or refund. Sec. 6. If it shall appear, after claim therefor filed with the Department, that an amount of tax or penalty has been paid which was not due under the provisions of this Act, whether as the result of a mistake of fact or an error of law, except as hereinafter provided, then the Department shall issue a credit memorandum to the person who made the erroneous payment, or in the event that such person shall have died or become incompetent, to such person's legal representative, as such. The amount of

such credit memorandum shall be credited against any tax or penalty due or to become due under this Act from the person who made the erroneous payment. If no tax or penalty is due and no proceeding is pending to determine whether such person is indebted to the Department for tax or penalty or either, the credit memorandum so issued may be assigned and set over by the lawful holder thereof, subject to reasonable rules of the Department, to any other person who is subject to the provisions of this Act, and the amount thereof applied by the Department against any tax or penalty due or to become due under this Act from such assignee. * * *

445a. Claims for credit. Sec. 6a. Claims for credit shall be prepared and filed upon forms provided by the Department. * * *

445b. Tentative determination of claim—Notice—Hearing—Review. Sec. 6b. As soon as practicable after a claim for credit is filed the Department shall examine the same and determine the amount of credit to which the claimant or the taxpayer's legal representative, in the event that the taxpayer shall have died or become incompetent, is entitled and shall, by its Notice of Tentative Determination of Claim, notify the claimant or his legal representative of such determination, which determination shall be prima facie correct. Proof of such determination by the Department may be made at any hearing before the Department or in any legal proceeding by a photostatic copy of the Department's record relating thereto, in the name of the Department under the certificate of the Director of Revenue. Such photostatic copy shall, without further proof, be admitted into evidence before the Department in any legal proceeding and shall be prima facie proof of the correctness of the Department's determination, as shown therein. If such claimant, or the legal representative of a deceased or incompetent taxpayer, shall within twenty (20) days after the Department's notice of Tentative Determination of Claim, file a protest thereto and request a hearing thereon, the Department shall give notice to such claimant, or the legal representative of a deceased or incompetent taxpayer, of the time and place fixed for such hearing, and shall hold a hear-

ing in conformity with the provisions of this Act, and pursuant thereto shall issue its Final Determination of the amount, if any, found to be due as a result of such hearing, to such claimant, or the legal representative of a deceased or incompetent taxpayer. The Department's Final Determination may be reviewed by the proper Circuit or Superior Court, in the same manner, within the same time, upon the same terms and conditions and to the same extent, as provided by Section 12 of this Act. Appeals from final orders or judgments of such courts shall be taken as in said Section 12 is provided. Added by act approved July 21, 1947. L. 1947, p. 1458.

451. Review of determination of Department. Sec. 12.

* * * * * * *

The Circuit or Superior Court of the County wherein the taxpayer has his principal place of business, or of Sangamon County in those cases where the taxpayer does not have his principal place of business in this State, shall have power to review all final administrative decisions of the Department in administering the provisions of this Act.

* * * * * * *

Appeals from all final orders and judgments entered by the Circuit or Superior Court upon review of the Department's determination in any case shall be taken directly to the Supreme Court by either party to the proceeding, and shall be governed by the rules applicable to civil cases appealed to said Supreme Court. The remedy herein provided for appeal shall be exclusive.

* * * * * * *

452. Violations—Penalties. Sec. 13. Any person engaged in the business of selling tangible personal property at retail in this State who fails to make a return, or to keep books and records as required herein, or who makes a fraudulent return, or who wilfully violates any rule or regulation of the Department for the administration and enforcement of the provisions of this Act, or any officer or agent of a corporation engaged in the business of selling tangible personal property at retail in this State who signed

a fraudulent return made on behalf of such corporation, or any itinerant vendor, as herein defined, who after notice fails to file the bond required by Section 12½ of this Act, is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than twenty-five ($25.00) dollars nor more than five thousand ($5,000.00) dollars, or be imprisoned in the county jail for not less than one (1) month nor more than six (6) months, or be both so fined and imprisoned, in the discretion of the court.

Any person who violates any provision of Section 2a of this Act is guilty of a misdemeanor and upon conviction thereof shall be fined not less than twenty-five ($25.00) dollars nor more than five hundred ($500.00) dollars, or be imprisoned in the county jail not more than six (6) months, or be both so fined and imprisoned, in the discretion of the court. Each and every day any such person engaged in business in violation of said Section 2a shall constitute a separate offense.

453. Title of Act—Tax additional. Sec. 14. This Act shall be known as the "Retailers' Occupation Tax Act" and the tax herein imposed shall be in addition to all other occupation or privilege taxes imposed by the State of Illinois or by any municipal corporation or political subdivision threof.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1950

No. 133

NORTON COMPANY, a corporation,
Petitioner,

vs.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS,
Respondent.

REPLY OF PETITIONER TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

ROLAND TOWLE,
111 W. Washington Street,
Chicago 2, Illinois.
Counsel for Petitioner.

BARNARD & MILLER, 33 S. Market St., Chicago 6. FRanklin 2-0562

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In its brief in opposition to Norton Company's petition for writ of certiorari, respondent does not deny the opinion of the Supreme Court of Illinois is in conflict with the decisions of this court and with the decision of the Circuit Court of Appeals cited by petitioner. Neither is there a denial that the questions involved are substantial and will affect all companies doing both an intrastate business in Illinois and an interstate business.

Respondent seeks to justify the decision of the lower court by citing cases of this court involving use taxes, manufacturing taxes and other taxes.

Respondent does not deny that as to the sales which are the basis of petitioner's claim, Norton Company is engaged in interstate commerce. It urges, however, that such interstate commerce can be taxed merely because petitioner, as to *other sales*, not here involved, was doing an intrastate business. The respondent is not consistent in that position, because it allowed part ($4110.09) of Norton Company's claim based on sales on orders accepted in Massachusetts, for machines manufactured in Massachusetts and shipped from there to Illinois customers, in interstate commerce. It gave as its reason for the allowance of that part of the claim that those sales were in interstate commerce and therefore not taxable (R. 11). However, all of the orders involved were accepted in Massachusetts, the goods ordered were all manufactured in Massachusetts and shipped from there to Illinois customers in interstate commerce. Norton Company denies its interstate business is taxable under the retailers' occupation tax act merely because it also does an intrastate business in Illinois.

The cases cited by respondent do not sustain respondent's theory. The respondent, to sustain its contention that interstate commerce can be taxed, cites decisions of this court involving three other forms of tax, namely, use taxes, sales taxes levied on the purchaser, and a manufacturer's privilege tax. While the respondent cites these cases, it is quite frank to admit no one of them is controlling in this case, but insists that read compositely they sustain its position. In other words, respondent contends that while each link in its chain of citations is too weak to support its present contention, the chain itself is strong enough to do so. This is a novel twist to the maxim that a chain

is no stronger than its weakest link. Not one of the cases cited by respondent involved a tax imposed upon the seller as is the Illinois tax. The nature of the taxes in those cases (which were different from the Illinois tax) is the very reason that those taxes were imposed. That is why they were sustained as constitutional. In each of those cases, the taxable event took place entirely in the taxing state. As to the use tax, the use of the article occurred in the state imposing that tax. As to the sales tax, the buyer on whom the tax was laid, took possession in the state imposing the tax under a contract made in that state, and as to the manufacturer's privilege tax, the manufacture took place in the state imposing that tax. The taxable event having occurred in the state imposing the tax, such imposition was held to be constitutional. It was immaterial that the law imposing the tax likewise made the seller the agent of the state to collect the use tax or sales tax from the taxpayer or that the size of the manufacturer's tax was to be measured by the gross sales of such manufactured products.

The Illinois legislature has not seen fit to levy any of those forms of tax. It has been content to levy a retailers' privilege tax, i. e., a tax on the seller, which has never been held to extend to interstate commerce and which the act itself expressly recognizes is not imposed thereon (Sec. 441, ch. 120, Ill. Rev. Stat. 1949).

The respondent cites *Nelson* v. *Sears Roebuck & Co.*, 312 U. S. 359 and *Nelson* v. *Montgomery Ward & Co.*, 312 U. S. 373. These cases involve a use tax and this court there pointed out that the tax is upon the purchaser for the use in Iowa of the commodities purchased and is a tax on the privilege of use after commerce is at an end. Obviously, those cases are no authority for imposing a privilege tax

on a seller of goods in interstate commerce, under the authority of the Illinois retailers' occupation tax act. Norton Company, as to the sales involved herein, was not doing business in Illinois.

Also cited by respondent is *American Manufacturing Co.* v. *St. Louis*, 250 U. S. 459. The court had before it a manufacturer's tax in the nature of an excise upon the conduct of a manufacturing business located in the city of St. Louis. There the American Manufaucturing Company was actually engaged in manufacturing in St. Louis and the tax was on that business. That case is no authority on which to tax interstate commerce in this case. In the instant case, Norton Company as to the sales which were the basis of its claim for credit, was not doing business in Illinois. Furthermore, it did no manufacturing in Illinois.

Respondent cites *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33. There the court had before it a sales tax which was akin to the use tax because the ultimate burden of the tax, both in form and substance, was laid on the buyer for consumption. The New York tax was conditioned upon taxable events which occurred in the State of New York. In that case the sales contracts were all entered into in New York with New York customers. The deliveries were made in New York. The court there pointed out that the New York tax had no different effect upon interstate commerce than a tax on the use in New York of property which had just moved in interstate commerce. That case has no bearing on the Illinois retailers' occupation tax.

The respondent cites *International Harvester Co.* v. *Department of Treasury*, 322 U. S. 340. There this court had before it an income tax on corporations doing business in Indiana. The court pointed out the delivery of goods in that state was the taxable event and that Indiana was asserting authority over the fruits of transactions consum-

mated within its borders. The court also pointed out it had before it a case involving sales of Indiana goods to Indiana purchasers and sales by Indiana sellers of Indiana goods to purchasers who came to Indiana to take delivery there. The agreements to sell and the deliveries took place in Indiana. The court held those events would sustain an income tax by Indiana. The taxable event in that case was the consummation of the transactions in Indiana. That event was distinct from the interstate movement of the goods and took place after the interstate journey ended. We thus see that the court there did not have before it an occupation tax, such as now before this court.

Respondent also cites *General Trading Co.* v. *Tax Commission*, 322 U. S. 335, and concludes that these last two cases support the theory that the state of Illinois could tax Norton Company upon receipt of orders in Massachusetts, the acceptance of them in Massachusetts, the manufacture of the goods in Massachusetts and the shipment of the goods from there to Illinois in interstate commerce, if it does any business at all even though that business involved only soliciting within the state of Illinois. These cases do not so hold.

If Illinois desires to impose a constitutional tax in connection with transactions such as those involved in this case, the general assembly may have the power to do so by means of a use tax, as was done in Iowa, which has both a sales tax and a use tax. The lower court has no right to invade the legislative field and by judicial decision in effect impose the equivalent of a use tax, simply because respondent is dissatisfied with controlling decisions of this court and prior decisions of the Illinois Supreme Court as well as with the express language of the general assembly itself in section 2 of the retailers' occupation tax act, which forbids the application of the latter tax to interstate trans-

actions. If the decision of the lower court is permitted to stand, there would seem to be no further bar to the power of the several states to tax interstate commerce.

It is earnestly contended that while Norton Company does an intrastate business in Illinois, yet its other business which the lower court admits is interstate commerce, cannot be taxed merely because of the intrastate business.

It is respectfully submitted that the writ of certiorari issue in this case in order that this court may state its position in view of the latest attempt by a state to encroach upon the federal power over interstate commerce.

Respectfully submitted,

ROLAND TOWLE,
Counsel for Petitioner.

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

IVAN A. ELLIOTT,
Attorney General of the State of Illinois,
Suite 900, 160 N. La Salle Street,
Chicago 1, Illinois,
Attorney for Respondent.

WILLIAM C. WINES,
RAYMOND S. SARNOW,
JAMES C. MURRAY,
Assistant Attorneys General,
Of Counsel.

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The Question Sought To Be Presented.

Petitioner manufactures and sells tangible products. Its main office is at Worcester, Massachusetts. It maintains a warehouse in Illinois, at which it accepts orders and from which it ships its products in concededly taxable intrastate transactions. But it also accepts in Massachusetts orders for shipment of its products from Massachusetts for delivery in Illinois. Is the Commerce Clause offended by measuring the Illinois Retailers' Occupation Tax by the gross receipts from these interstate sales?

ARGUMENT.

I.

The Commerce Clause does not inhibit the exaction of the tax involved in this case.

The Illinois Supreme Court said in deciding the instant case (405 Ill. 314) (Tr. 133):

> "It was never intended that interstate commerce should not bear its own share of taxation. There would be no doubt that the State could tax sales made by the appellant if it were an Illinois corporation selling to customers in this State. It would be inequitable to say that the same corporation should not pay a similar tax when it manufactures out of the State and ships and sells within the State. On the same basis, foreign corporations should not receive preference in business competition over business within the State by being exempt from paying such tax. By making the appellant pay, as in the situation before us, the State is not making an out-of-State company pay more than its fair share of the taxation burden. It is not attempting to tax gross receipts of appellant nor to tax goods which are sold or consumed or used in other States. The State is only making appellant pay the same tax as is required of its own citizens."

Insofar as this determination may be regarded as a pronouncement upon the facts, including the fact of reasonableness, it is, we submit, conclusive at the bar of this Court unless it can be said to be without substantial support in the record or in those matters of fact of which courts take judicial notice.

BRIEF SUMMARY OF THE RELEVANT PRESENTLY STANDING PRINCIPLES OF CONSTITUTIONAL LAW RELATING TO TAXES MEASURED BY GROSS RECEIPTS FROM INTERSTATE SALES.

It is no longer a precept of Federal constitutional law, if it ever was, that a State tax is invalid merely because it is measured by the gross receipts from sales of goods shipped in interstate commerce. So far as this Court is concerned, such a tax is not *per se* invalid. This is true whether the taxing State conceives the exaction as a "use tax" levied nominally upon the purchaser but for which the seller is liable to the State, the orders being accepted either within or without the state and the goods being shipped from without the State,[1] or a "sales tax",[2] or a "tax upon the privilege of doing business" although the sales involve transportation in interstate commerce from the taxing State to other States[3] or involve transportation from sister States to customers also without the taxing State.[4]

With these cardinal principles in mind, let us consider the following recent monuments in the field of constitutional law as applied taxes measured by gross receipts from sales involving interstate commerce either before or after the technical "passage of title".

NELSON v. SEARS ROEBUCK & CO., 312 U. S. 359, AND NELSON v. MONTGOMERY WARD & CO., ID.

These two companion cases involved the following facts:

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[1] *Felt and Tarrant* v. *Gallagher*, 306 U. S. 62. *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359. *Nelson* v. *Montgomery Ward & Co.*, *id.* 373. *General Trading Co.* v. *Tax Commission*, 322 U. S. 335, in which the vendor did no business in the taxing State except soliciting orders and the goods were shipped from without the State.

[2] *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33.

[3] *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459.

[4] *American Mfg. Co.* v. *St. Louis*, cited note 3 above, some of the goods involved having been shipped from within, some from without, the taxing State.

Iowa law levies a "sales tax" nominally imposed on intrastate buyers and a complementary "use tax", nominally imposing the latter exaction upon Iowa residents who import goods from out-of-State vendors. But although the two companion taxes were thus nominally imposed upon the purchaser, the vendor was required to "collect" and in fact to pay the tax. There was of course no actual machinery for collecting the tax from Iowa residents because Iowa authorities could have no conceivable means of knowing what goods a resident of Des Moines or Dubuque bought from Sears Roebuck except by surveillance of Sears Roebuck.

Thus, so far as the flow of interstate commerce was concerned, which is all that this Court was concerned with, the economic incidents, consequences and burdens were exactly like those entailed by the Illinois act: An Iowa purchaser ordered goods from Sears, Roebuck or Montgomery-Ward, paid a sum that constituted the purchase price augmented by the tax and received his goods. *The goods were shipped from Illinois. And in many cases, the orders were not only accepted in Illinois but were first received there.* But, as in the instant case, both Sears, Roebuck and Montgomery-Ward maintained retail stores in Iowa. *Although the orders were not received or accepted in,* nor were they filled from, these Iowa stores, this Court held the Illinois mail order companies liable for the Iowa tax.

Since this Court stresses practical incidence and consequences of the tax burdens, not the metaphysics of State jurisprudence, as the *criterion* of Federal constitutionality, it is simply unthinkable that this Court would have reached a different result if Iowa had laid the tax in terms upon the mail order houses rather than upon the purchasers.

But if, notwithstanding the precise economic similarity between the Iowa "use tax" imposed upon the buyer but

actually remitted by the seller and the Illinois tax, it is insisted that the theoretical distinction between a tax on the "buyer" and a tax on the "seller" is material, let us consider the case of

AMERICAN MFG. CO. v. ST. LOUIS, 250 U. S. 459.

In this case St. Louis imposed a privilege tax upon the privilege of manufacturing within the city limits, the tax being payable annually and *measured by the gross receipts from the sale of the manufactured goods.*

The taxpayer removed some of its goods, without selling the same, to warehouses outside of Missouri. Later it sold these goods, shipping them from points outside Missouri. It also sold some goods in interstate commerce, shipping directly from Missouri. This Court held that both types of sales—those in which shipment was made from within, and those in which shipment was made from without, the taxing State—might properly measure a privilege tax.

McGOLDRICK v. BERWIND-WHITE CO., 309 U. S. 33.

The Illinois Supreme Court has recognized this case as marking a turning point in constitutional doctrine so far as the taxability of interstate commerce is concerned. See the Illinois Supreme Court's opinion in *Standard Oil Co.* v. *Department of Finance*, 383 Ill. 136.

In the *Berwind-White* case, a New York sales tax was measured by the gross receipts from the sale of coal. The orders were accepted in New York. But the coal was mined in Pennsylvania. In most cases the coal was delivered in New York. But the dissenting opinion notes (p. 60) that there "were two purchasers who took delivery outside New York." The tax was sustained.

INTERNATIONAL HARVESTER CO. v. DEPARTMENT OF THE TREASURY, 322 U. S. 340, AND THE COMPANION CASE GENERAL TRADING CO. v. TAX COMMISSION.

Closely in point is this Court's decision *International Harvester Co.* v. *Dept. of Treasury*, 322 U. S. 340.

In that case this Court had occasion to determine the validity of Indiana's gross receipts tax to transactions, *inter alia*, which it thus described:

> "Sales by branches to dealers and users residing in Indiana, in which the goods were shipped from outside Indiana to customers in Indiana, by contracts so providing."

If petitioner seeks to distinguish this case on the ground that the sale was made "by branches in Indiana", the reply is that the companion case of *General Trading Co.* v. *Tax Commission*, *id.* 335, the General Trading Co. "never qualified in Iowa and has no office, branch or warehouse there" (*dissent*, page 339) and "orders are accepted only in Minnesota." Nevertheless this Court sustained the tax. True, the Iowa tax was nominally imposed on the purchaser and the non-resident taxpayer was nominally a "collector." The fact remains, though, that one who merely solicited orders in Iowa was subject to that State's taxing power, the tax being measured by gross receipts, even though the goods were shipped and title passed from without the State.

These two cases, which were decided together and must be read together, sustain State taxes even though (1) the taxpayer receives orders without the taxing State, accepts them without the State and fills them without the State if it does *any business at all, even though the business involved be only soliciting* within the State where the goods are delivered.

THE APPLICABILITY OF THE FOREGOING CASES TO THE INSTANT CASE.

Perhaps no one of the cases cited above, *standing alone*, would be immediately controlling in the instant case. Possibly each of them, *standing alone*, could be distinguished from the instant case in some feature that might be thought salient. But *read compositely*, they dispose of *every point made by petitioner for the invalidity of the instant taxes.* Let us show this:

It might be thought from this Court's diction in the *Montgomery-Ward* and *Sears, Roebuck* cases that the important consideration in those cases was that Iowa had imposed a "use tax" on Iowa purchasers who ordered goods from without the State as a corollary to a "sales" tax on purchasers who bought them without the State. But in the *American Manufacturing* case, the tax was a privilege tax on the seller.

It might be thought from the *American Manufacturing Co.* case and the *Berwind-White* case that the important thing was the acceptance of orders in the taxing state. But in the *Sears, Roebuck* and *Montgomery-Ward* cases, the orders were received in Chicago. They were accepted there. The goods were shipped from there. Title passed there, yet an Iowa tax was sustained.

In the *Sears, Roebuck* case this Court held *directly and specifically* that the presence of retail outlets in Iowa was sufficient to subject Sears, Roebuck to the exertion of Iowa's taxing power *even when the tax imposed was measured by sales as to which the order was received, accepted and filled in Chicago.*

CASES INVALIDATING CERTAIN STATE TAXES DISTINGUISHED.

Petitioner relies on *Crenshaw* v. *Arkansas*, 227 U. S. 389. This case is effectively distinguished on one ground by *Berwind-White*, cited *ante*, and on another by the *Sears, Roebuck* case, also cited *ante*. It struck down a tax in the form of a *flat license fee* for each solicitor of an extra-State vendor. The vendor did no business in the State except solicit orders and ship and deliver merchandise. In the *Berwind-White* case this Court, distinguishing a line of cases like the *Crenshaw* case, said at page 57:

> "It is enough for present purposes that the rule" [that is, the rule forbidding license fees or taxes for merely soliciting orders] "has been narrowly limited to *fixed sum* license taxes imposed on the business of soliciting orders for goods to be shipped in interstate commerce."

In the *Sears, Roebuck* and *Montgomery-Ward* cases this Court indicated *passim* that immunity to tax with respect to one who merely solicits orders is limited to one who *does not maintain a retail outlet in the taxing State*. The presence of such an outlet, this Court held, supports the exertion of the State's taxing power *even though the tax is measured by sales representing orders received, accepted and filled wholly within another State*. And finally in the *General Trading Co.* case, *ante*, the court removed even this limitation. It sustained the collection of a tax *even though the company had no office at all in the taxing State and merely solicited orders there*.

Therefore, to sum up and dispose of the *Crenshaw* case: It involved a tax which, *first*, was a "fixed fee" and, *second*, was sought to be imposed upon *a vendor who had no retail outlet in the taxing State*. Each of these features, present in *Crenshaw* and absent here, has been held to dis-

tinguish the *Crenshaw* type case from cases like the instant case. Finally the *General Trading Co.* case does away even with the requirement that there be a retail outlet in the taxing State.

Freeman v. *Hewitt*, 329 U. S. 249, and *Adams* v. *Storen*, 304 U. S. 307, can be shortly disposed of. The Indiana "gross receipts tax" is levied on the receipt of *all* income by a resident of Indiana, whether derived from within Indiana or not, and upon income accruing even to non-residents if its source is within Indiana. *The tax is tied to no activity, privilege or other basis than residence or, in the case of non-residents, situs of the source within Indiana.* In the *Adams* case this Court makes it plain that Indiana could have taxed the sales in question if it had undertaken to do so under an act taxing the privilege of making them and not under a statute leveled at *all* interstate income of residents. The court said at page 310:

> "The" (Indiana gross receipts) "tax is not an excise for the privilege of domicile alone, since it is levied upon the gross income of non-residents from sources within the State. Nor is it for the transaction of business, since in many instances it hits the receipt of income by one who conducts no business."

The court further said at page 312:

> "The state court and the appellees rely strongly upon *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459. . . . But that case dealt with a municipal license fee for pursuing the occupation of manufacturer in St. Louis."

Thus the *Adams* case declares in express terms that a tax on gross receipts from interstate commerce is constitutional *if it is levied upon the privilege of doing business* and that *this is true even though the goods are shipped from without the State;* for in the *Adams* case the court approved but distinguishes the *American Mfg. Co.* case

on the ground that the tax in the American Mfg. Case was a privilege tax.

The *Hewitt* case, cited above, is likewise distinguishable. There the taxpayer sold securities in another State through a broker. He was not taxed for the privilege of selling them. The tax was not an income tax, the basis for which is domicile, because it "hit non-residents." And it was not a privilege tax because it was aimed at no privilege. There was therefore no basis for this wholly impost on the proceeds of the sale of securities outside of Indiana.

THE PRINCIPLE EMERGENT FROM THE CASES CITED UNDER THIS POINT.

From the authorities above considered there emerges this principle, clearly defined and decisively applicable in this case:

> ONE WHO ENGAGES IN BUSINESS IN ILLINOIS TO THE EXTENT OF MAINTAINING SALES PERSONNEL AND A STOCK OF GOODS MAY BE TAXED, SO FAR AS THE UNITED STATES CONSTITUTION IS CONCERNED, UPON SALES WHERE THE GOODS BOUGHT ARE SHIPPED INTO THE STATE. THIS IS TRUE NO MATTER WHERE THE ORDER IS ACCEPTED AND NO MATTER WHERE TITLE PASSES. EVEN THE SOLICITATION OF ORDERS ALONE MAY BE TAXED PROVIDED (1) THAT THE TAX IS MEASURED BY THE VOLUME OF ORDERS ACCEPTED WHERE GOODS ARE SUBSEQUENTLY SHIPPED INTO THE STATE OR (2) IS COUPLED WITH THE MAINTENANCE OF RETAIL OUTLETS. THIS IS TRUE EVEN THOUGH THE ORDERS HAVE NOTHING TO DO WITH SUCH OUTLETS AND ARE ACCEPTED IN ANOTHER STATE.

This principle rules this case so far as constitutional questions are concerned.

The Illinois constitutional or legislative theory upon which the tax is predicated is of moment here so long as the *application of the theory* does not result in any dis-

crimination, preferment or burden that would offend Federal constitutional doctrine. True, this Court has from time to time looked at the theory implicit in a state taxing statute that has been assailed as offensive to the Commerce Clause. But it has looked to the state's theory of taxation only insofar as that theory may have marked, or may be supposed to mark, practical limits of taxation that may result in an unconstitutional *onus* on interstate commerce. Thus, in *Freeman* v. *Hewitt*, 329 U. S. 249, analyzed and discussed, *ante*, this Court did take into account the character of the Indiana state tax as a "gross receipts tax", observing that it was tied to no activity, privilege or other basis than residence or, in the case of non-residents, situs of the source within Indiana. But this theory had to do, not merely with Indiana's *rationale*, of the legitimacy of the tax under Indiana's constitution, but with the actual and practical preferences or discriminations that might result from the tax. Multiplication by several states of "gross receipts taxes" of Indiana's type might very well restrain interstate commerce. By doing a concededly intrastate and concededly taxable business, coupled with making shipments of goods that ultimately come to rest in Illinois, affords a very appropriate objection upon which to exert the State's taxing power.

The Illinois Supreme Court's opinion is conclusive as to all matters of fact including, we submit, the fact of reasonableness, the Illinois Supreme Court's opinion as to reasonableness not being in itself unreasonable. It is likewise conclusive as to all questions of the legitimacy of the tax under Illinois law.

We respectfully submit that the Illinois taxing statute, as construed by the Illinois Supreme Court, and as applied to facts in this case as found or judicially noticed by that

court, is constitutional and that its imposition raises no questions so fairly debatable as to elicit *certiorari*.

Conclusion.

For the reasons stated in the Illinois Supreme Court's opinion and urged in this brief, it is respectfully submitted that *certiorari* should be denied.

Respectfully submitted,

IVAN A. ELLIOTT,
Attorney General of the State of Illinois,
Attorney for Respondent.

WILLIAM C. WINES,
RAYMOND S. SARNOW,
JAMES C. MURRAY,
Assistant Attorneys General,
Of Counsel.

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DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS,

Respondent.

BRIEF OF RESPONDENT.

IVAN A. ELLIOTT,
Attorney General of the State of Illinois,
Suite 900, 160 N. La Salle Street,
Chicago 1, Illinois, FInancial 6-2000,
Attorney for Respondent.

WILLIAM C. WINES,
RAYMOND S. SARNOW,
JAMES C. MURRAY,
Assistant Attorneys General,
Of Counsel.

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I.

Certain of petitioner's sales are consummated as follows:

1. Orders from Illinois customers are received at petitioner's Illinois plant, where they are examined for the purchaser's credit and with respect to availability of merchandise at the Illinois plant. But they are referred to Massachusetts either because the purchaser's credit has not been approved for recognition in Illinois or because the ordered goods are not available at the Illinois plant.

2. These orders are accepted in Massachusetts and are filled from petitioner's stock of goods in that State.

3. The goods are segregated for the purchaser in Massachusetts, title passing in that State, but are shipped in consolidated consignment to petitioner's Illinois office, when they are dispatched to petitioner's customers in the original, or Massachusetts, package. Thus, though title passes in Massachusetts, petitioner ultimately relinquishes possession in Illinois.

May these sales constitutionally measure the Illinois Retailers' Occupation Tax?

II.

Certain of petitioner's sales are consummated as follows:

1. Orders are received at petitioner's Massachusetts plant, are accepted there, are filled from petitioner's Massachusetts stock of goods, segregation occurring in that State.

2. These segregated packages are then consigned to petitioner's Illinois plant, where they are reconsigned to Illinois customers. In this class of sales petitioner ultimately relinquishes possession in Illinois.

Sales in this class differ from sales in Class I only in that the order is first received in Massachusetts, whereas in the Class I sales the orders are received in Illinois but forwarded to Massachusetts for acceptance.

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III.

Certain of petitioner's sales are consummated as follows:

1. Orders are received at petitioner's Illinois plant, where they are examined, as are the orders in Class I sales, described *supra*, for purchasers' credit and availability in Illinois of ordered merchandise.

2. These orders are forwarded to and accepted in Massachusetts and are filled from petitioner's stock of goods in that State.

3. The goods are consigned directly from Massachusetts to the Illinois customer, there being no intermediate consignment to the Illinois plant for reconsignment to the Illinois customer.

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IV.

Certain of petitioner's sales are consummated as follows:

1. Orders from Illinois customers are received, accepted and filled at petitioner's Massachusetts plant. The goods are shipped directly from Massachusetts to the Illinois customer.

Does petitioner's engagement in concededly intrastate business in Illinois render this latter class of sales a constitutionally permissible measure of the Illinois Retailers' Occupation Tax?

SUMMARY OF ARGUMENT.

I.

Allied Mills v. Department of the Treasury, 318 U. S. 740, is directly in point as to petitioner's sales in Classes I and II.

II.

This court's decisions sustain the constitutionality of the Illinois tax upon all of petitioner's sales involved in this case.

III.

Neither this court's decisions nor constitutional principles inhibit the exaction of any of the taxes imposed on petitioner.

ARGUMENT.

Analysis of the Four Classes of Transactions Involved.

Petitioner regularly makes concededly wholly intrastate sales in Illinois. As to these sales it admits liability for and pays the Illinois Retailers' Occupation Tax. These sales are important only because they admittedly engage petitioner in business in Illinois, the fact of such engagement being important under the teaching of many of this Court's cases relied upon by respondent as sustaining the constitutionality of the tax in question.

In addition to these concededly intrastate and admittedly taxable sales, the petitioner makes sales which may be analytically divided into the following four classes:

CLASS I: The order is **received in Illinois.** It is accepted and filled in Massachusetts. The buyer's goods are segregated in Massachusetts, title passing in Massachusetts. But the goods are **consigned to petitioner's plant in Illinois, possession is relinquished by petitioner in Illinois, and the goods are reconsigned for delivery to the purchaser in Illinois.**

CLASS II: Orders are **received in Illinois**, are accepted and filled in Massachusetts, title passing in Massachusetts, exactly as in Class I, but the goods are **consigned directly to Illinois purchasers.**

CLASS III: **Orders are received** in Massachusetts, are accepted and filled in Massachusetts, but the goods, as in the case of sales in Class I, **are consigned to petitioner's plant in Illinois, possession is relinquished by petitioner in Illinois, and the goods are reconsigned for delivery to the purchaser in Illinois.**

CLASS IV: Orders are **sent from Illinois**, are received, accepted and filled in Massachusetts, the goods being **consigned directly to Illinois purchasers.**

I.

ALLIED MILLS v. DEPARTMENT OF THE TREASURY, 318 U. S. 740, IS DIRECTLY IN POINT AS TO PETITIONER'S SALES IN CLASSES I AND II.

In *Allied Mills* v. *Department of Treasury*, 318 U. S. 740, this Court affirmed *per curiam* Supreme Court of Indiana's decision in *Department of Treasury* v. *Allied Mills*, 220 Ind. 340, 42 N. E. 2d 34.

The Indiana Supreme Court thus tersely stated the relevant facts (220 Ind. 340 at 341, 42 N. E. 2d at 34):

> "The appellee is an Indiana corporation engaged in the manufacture and sale of live stock and poultry feeds, in connection with which it operates a number of factories. In the conduct of its business the appellee divided this State into three geographical areas, each of which was served from a designated factory located at Fort Wayne, Indiana, Peoria, Illinois, or East St. Louis, Illinois. The facilities of these factories were substantially alike and the method of distribution adopted was for the purpose of taking advantage of favorable freight rates, which were reflected in sale prices, and not to evade taxes. The gross income with which we are concerned was derived from sales to resident customers in Indiana to whom deliveries were made from the plants in Illinois, pursuant to orders taken in Indiana and accepted in Illinois."

This Court upheld the exaction of Indiana's gross receipts tax with respect to the taxpayer's sales as described in the excerpt above quoted.

In *International Harvester Co.* v. *Department of Treasury*, 322 U. S. 340, this Court thus authoritatively explained its *per curiam* affirmance in the *Allied Mills* case. This Court said at page 346:

> "The sales in Class E embrace those by an Indiana seller to an Indiana buyer where the goods are shipped

from points outside the State to the buyer. The validity of the tax or receipts from such sales would seem to follow *a fortiori* from our recent affirmance *per curiam* (318 U. S. 740) of *Department of Treasury* v. *Allied Mills*, 220 Ind. 340, 42 N. E. 2d 34. In that case an Indiana corporation had one factory in Indiana and two in Illinois. Each factory was given a specified part of Indiana to service—a method of distribution adopted to take advantage of favorable freight rates, not to evade taxes. The issue in the case was whether the Indiana gross income tax could be applied to receipts from sales to resident customers in Indiana to whom deliveries were made from the plants in Illinois pursuant to orders taken in Indiana and accepted in Illinois. The Indiana Supreme Court sustained the imposition of the tax. We affirmed that judgment on the authority of *Felt & Tarrant Co.* v. *Gallagher*, 306 U. S. 62, and *McGoldrick* v. *Felt & Tarrant Co.*, 309 U. S. 70."

The constitutionally exigent facts in the *Allied Mills* case and in the "Class E" sales in the *International Harvester* case mentioned in this Court's language just above quoted are precisely like the facts which characterize the instant petitioner's sales in Classes I and II, *ante*. Sales in the *Allied Mills* case and the "Class E" sales in the *International Harvester* case were, as are petitioner's sales in Classes I and II of this case, sales by a corporation foreign to but doing business within the taxing State, the goods being shipped "from points outside the State to the buyer", who was within the taxing State.

If it be suggested that the sales in Allied Mills and the Class E sales in International Harvester, though factually similar to those involved in this case, were taxed under a gross receipts tax, whereas the Illinois exaction is a tax on the privilege of doing business in Illinois, it must be replied that the distinction, if relevant at all, militates *a fortiori* in favor of the Illinois tax: for the Illinois tax requires, as a fulcrum for the exertion of Illinois taxing

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> "The appellee is an Indiana corporation engaged in the manufacture and sale of live stock and poultry feeds, in connection with which it operates a number of factories. In the conduct of its business the appellee divided this State into three geographical areas, each of which was served from a designated factory located at Fort Wayne, Indiana, Peoria, Illinois, or East St. Louis, Illinois. The facilities of these factories were substantially alike and the method of distribution adopted was for the purpose of taking advantage of favorable freight rates, which were reflected in sale prices, and not to evade taxes. The gross income with which we are concerned was derived from sales to resident customers in Indiana to whom deliveries were made from the plants in Illinois, pursuant to orders taken in Indiana and accepted in Illinois."

This Court upheld the exaction of Indiana's gross receipts tax with respect to the taxpayer's sales as described in the excerpt above quoted.

In *International Harvester Co.* v. *Department of Treasury*, 322 U. S. 340, this Court thus authoritatively explained its *per curiam* affirmance in the *Allied Mills* case. This Court said at page 346:

> "The sales in Class E embrace those by an Indiana seller to an Indian buyer where the goods are shipped

from points outside the State to the buyer. The validity of the tax on receipts from such sales would seem to follow *a fortiori* from our recent affirmance *per curiam* (318 U. S. 740) of *Department of Treasury* v. *Allied Mills*, 220 Ind. 340, 42 N. E. 2d 34. In that case an Indiana corporation had one factory in Indiana and two in Illinois. Each factory was given a specified part of Indiana to service—a method of distribution adopted to take advantage of favorable freight rates, not to evade taxes. The issue in the case was whether the Indiana gross income tax could be applied to receipts from sales to resident customers in Indiana to whom deliveries were made from the plants in Illinois pursuant to orders taken in Indiana and accepted in Illinois. The Indiana Supreme Court sustained the imposition of the tax. We affirmed that judgment on the authority of *Felt & Tarrant Co.* v. *Gallagher*, 306 U. S. 62, and *McGoldrick* v. *Felt & Tarrant Co.*, 309 U. S. 70."

The constitutionally exigent facts in the *Allied Mills* case and in the "Class E" sales in the *International Harvester* case mentioned in this Court's language just above quoted are precisely like the facts which characterize the instant petitioner's sales in Classes I and II, *ante*. Sales in the *Allied Mills* case and the "Class E" sales in the *International Harvester* case were, as are petitioner's sales in Classes I and II of this case, sales by a corporation foreign to but doing business within the taxing State, the goods being shipped "from points outside the State to the buyer", who was within the taxing State.

If it be suggested that the sales in Allied Mills and the Class E sales in International Harvester, though factually similar to those involved in this case, were taxed under a gross receipts tax, whereas the Illinois exaction is a tax on the privilege of doing business in Illinois, it must be replied that the distinction, if relevant at all, militates *a fortiori* in favor of the Illinois tax; for the Illinois tax requires, as a fulcrum for the exertion of Illinois taxing

power, the taxpayer's engagement in the specifically defined business operation of retailing, the Indiana tax requiring only the realization of gross income by a taxpayer subject to Indiana law with any permissible Indiana contact with the taxed transaction and receipt.

Illinois submits that this Court's decisions in the *Allied Mills* case and with respect to the "Class E" sales in *International Harvester* case are decisive in favor of the taxability of Petitioner's Class I and Class II sales.

The cogent bearing of the *Allied Mills* and *International Harvester* cases of taxability of Petitioner's Class III and Class IV sales will be discussed under Point 2 immediately *post*.

II.

THIS COURT'S DECISIONS SUSTAIN THE CONSTITUTIONALITY OF THE ILLINOIS TAX UPON ALL OF PETITIONER'S SALES INVOLVED IN THIS CASE.

Illinois' contacts with petitioner's Class I sales are that (1) the order originates in Illinois, (2) it is received in Illinois, (3) the purchased goods, although segregated in Massachusetts, come to petitioner's Illinois plant, for relinquishment of petitioner's possession by reconsignment, and for receipt by an Illinois customer.

Illinois' contacts with petitioner's Class II sales are that (1) the order originates in Illinois, (2) it is received in Illinois, (3) and the goods are shipped from Massachusetts to his Illinois customer.

Illinois' contacts with petitioner's Class III sales are (1) the orders originate in Illinois, (2) they are received in Illinois, (3) and the goods are shipped from Massachusetts to an Illinois customer.

Illinois' contacts with petitioner's Class IV sales are (1) the orders originate in Illinois, where petitioner engages in a concededly intrastate business and in a course of conduct that, we argue *post*, amounts as a matter of law to solicitation of interstate business and (2) ultimate delivery is made to an Illinois customer.

Now petitioner is engaged in intrastate business in Illinois. The "Statement of the Case" in petitioner's brief here utters petitioner's *conclusion of law* that it "has no one soliciting business in Illinois". By this it means only that it does not employ conventional "drummers" or similar canvassers. It does, however, maintain a plant, a stock of goods, and persons who are authorized finally to accept some orders and to receive and forward other orders to petitioner's Massachusetts plant. Petitioner's Illinois office investigates the credit rating of customers whose orders are received in Illinois even though in many cases petitioner's Illinois *personnel* lack authority to approve credit deals.

Illinois says, notwithstanding petitioner's assertions to the contrary, that these activities constitute in a very real sense "the solicitation of business", as well as the doing of business, in Illinois. The maintenance in Illinois of a place of business staffed with *personnel* who may receive all orders and finally accept many orders is, we submit, at least as real a solicitation as is the sending of itinerant canvassers into a State in which the seller has no office and no stock of goods, the "drummers" being authorized to accept no orders whatever.

Bearing in mind these important facts and considerations of the economic relations of petitioner's business, let us turn to this Court's most recently enunciated and most nearly applicable decisions:

BRIEF SUMMARY OF THE RELEVANT PRESENTLY STANDING PRINCIPLES OF CONSTITUTIONAL LAW RELATING TO TAXES MEASURED BY GROSS RECEIPTS FROM INTERSTATE SALES.

It is no longer a precept of Federal constitutional law, if it ever was, that a State tax is invalid merely because it is measured by the gross receipts from sales of goods shipped in interstate commerce. So far as this Court is concerned, such a tax is not *per se* a burden on interstate commerce. This is true whether the taxing State conceives the exaction as a "use tax" levied nominally upon the purchaser but for which the seller is liable to the State, the orders being accepted either within or without the state and the goods being shipped from without the state,[1] or a "sales tax",[2] or a "tax upon the privilege of doing business" although the sales involve transportation in interstate commerce from the taxing State to other States[3] or involve transportation from sister States to customers also without the taxing State.[4]

With these cardinal principles in mind, let us consider the following recent monuments in the field of constitutional law as applied to taxes measured by gross receipts from sales involving interstate commerce either before or after the technical "passage of title".

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[1] *Felt and Tarrant* v. *Gallagher*, 306 U. S. 62. *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359. *Nelson* v. *Montgomery Ward & Co.*, *id.* 373. *General Trading Co.* v. *Tax Commission*, 322 U. S. 335, in which the vendor did no business in the taxing State except soliciting orders and the goods were shipped from without the State.

[2] *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33.

[3] *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459.

[4] *American Mfg. Co.* v. *St. Louis*, cited note 3 above, some of the goods involved having been shipped from within, some from without, the taxing State.

NELSON v. SEARS ROEBUCK & CO., 312 U. S. 359, AND NELSON v. MONTGOMERY WARD & CO., 312 U. S. 373.

These two companion cases involved the following facts: Iowa law levies a "sales tax" nominally imposed on intrastate buyers and a complementary "use tax", nominally imposing the latter exaction upon Iowa residents who import goods from out-of-State vendors. But although the two companion taxes were thus nominally imposed upon the purchaser, the vendor was required to "collect" and in fact to pay the tax. There was of course no actual machinery for collecting the tax from Iowa residents because Iowa authorities could have no conceivable means of knowing what goods a resident of Des Moines or Dubuque bought from Sears Roebuck except by surveillance of Sears Roebuck.

Thus, so far as the flow of interstate commerce was concerned, which is all that this Court was concerned with, the economic incidents, consequences and burdens were exactly like those entailed by the Illinois act: An Iowa purchaser ordered goods from Sears, Roebuck or Montgomery-Ward, paid a sum that constituted the purchase price augmented by the tax and received his goods. *The goods were shipped from Illinois. And in many cases, the orders were not only accepted in Illinois but were first received there.* But, as in the instant case, both Sears Roebuck and Montgomery-Ward maintained retail stores in Iowa. *Although the orders were not received or accepted in,* nor were they filled from, these Iowa stores, this Court held the Illinois mail order companies liable for the Iowa tax.

Since this Court stresses practical incidence and consequences of the tax burdens, not the metaphysics of State jurisprudence, as the *criterion* of Federal constitutionality, it is simply unthinkable that this Court would have reached

a different result if Iowa had laid the tax in terms upon the mail order houses rather than upon the purchasers.

But if, notwithstanding the precise economic similarity between the Iowa "use tax" imposed upon the buyer but actually remitted by the seller and the Illinois tax, it is insisted that the theoretical distinction between a tax on the "buyer" and a tax on the "seller" is material, let us consider the case of

AMERICAN MFG. CO. v. ST. LOUIS, 250 U. S. 459.

In this case St. Louis imposed a privilege tax upon the privilege of manufacturing within the city limits, the tax being payable annually and *measured by the gross receipts from the sale of the manufactured goods.*

The taxpayer removed some of its goods, without selling the same, to warehouses outside of Missouri. Later it sold these goods, shipping them from points outside Missouri. It also sold some goods in interstate commerce, shipping directly from Missouri. This Court held that both types of sales—those in which shipment was made from within, and those in which shipment was made from without, the taxing State—might properly measure a privilege tax.

McGOLDRICK v. BERWIND-WHITE CO., 309 U. S. 33.

The Illinois Supreme Court has recognized this case as marking a turning point in constitutional doctrine so far as the taxability of interstate commerce is concerned. See the Illinois Supreme Court's opinion in *Standard Oil Co.* v. *Department of Finance*, 383 Ill. 136.

In the *Berwind-White* case, a New York sales tax was measured by the gross receipts from the sale of coal. The orders were accepted in New York. But the coal was mined in Pennsylvania. In most cases the coal was deliv-

ered in New York. But the dissenting opinion notes (p. 60) that there "were two purchasers who took delivery outside New York". The tax was sustained.

INTERNATIONAL HARVESTER CO. v. DEPARTMENT OF THE TREASURY, 322 U. S. 340, AND THE COMPANION CASE GENERAL TRADING CO. v. TAX COMMISSION.

Closely in point is this Court's decision *International Harvester Co.* v. *Dept. of Treasury,* 322 U. S. 340, already discussed (Point I, *ante*) in its application to petitioner's Class I sales.

In that case this Court had occasion to determine the validity of Indiana's gross receipts tax to transactions, *inter alia,* which it thus described:

> "Sales by branches to dealers and users, residing in Indiana, in which the goods were shipped from outside Indiana to customers in Indiana, by contracts so providing."

If petitioner seeks to distinguish this case on the ground that the sale was made "by branches in Indiana", the reply is that the companion case of *General Trading Co.* v. *Tax Commission, id.* 335, the General Trading Co. "never qualified in Iowa and has no office, branch or warehouse there" (*dissent,* page 339) and "orders are accepted only in Minnesota". Nevertheless this Court sustained the tax. True, the Iowa tax was nominally imposed on the purchaser and the non-resident taxpayer was nominally a "collector". The fact remains, though, that one who merely solicited orders in Iowa was subject to that State's taxing power, the tax being measured by gross receipts, even though the goods were shipped and title passed from without the State.

These two cases, which were decided together and must be read together, sustain State taxes even though (1) the taxpayer receives orders without the taxing State, accepts them without the State and fills them without the State if it does *any business at all, even though the business involved be only soliciting* within the State where the goods are delivered.

III.

NEITHER THIS COURT'S DECISIONS NOR CONSTITUTIONAL PRINCIPLES INHIBIT THE EXACTION OF ANY OF THE TAXES IMPOSED ON PETITIONER.

Petitioner, it must be remembered, is a Massachusetts corporation engaged in doing a concededly intrastate business in Illinois. Without Illinois' suffrance petitioner could not do this business. That business consists not only in the solicitation and receipt of orders but in accepting and filling many of these orders wholly within Illinois.[1]

Illinois permits petitioner to maintain a plant, as well as managerial, sales and technical *personnel,* in Illinois, for the purpose of transacting concededly intrastate, as well as clearly interstate, commerce.

Petitioner may very largely determine whether an order received in Illinois from an Illinois customer will be filled from petitioner's Illinois stock of goods, in which case of course the transaction is taxable, or is to be forwarded to Massachusetts for acceptance and segregation of goods, in which case, says petitioner, the transaction is immune to the Illinois tax.

Petitioner's chief reliance is upon *McLeod* v. *Dilworth Co.*, 322 U. S. 327. In that case this Court refused to sanc-

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[1] We have demonstrated II, *ante*, that petitioner's activities *do* constitute "solicitation", notwithstanding petitioner's protests to the contrary.

tion a sales tax laid by Arkansas upon a Tennessee vendor that had no place of business, maintained no stock of goods, and engaged in no intrastate business in the taxing State. This Court deemed it relevant to say at page 328:

> "Respondents are not qualified to do business in Arkansas and have neither sales office, branch plant nor any other place of business in that State."

These factors, salient and we think decisive in the *Dilworth* case, are absent in the instant case. The instant petitioner *is* "qualified to do business" in Illinois, *does* have a "sales office," a "branch plant" and a "place of business in Illinois" and *does* process much of its interstate business in Illinois.

It is interesting to note that petitioner does not explicitly recognize any difference between the four categories of sales that we have analytically distinguished in beginning this Argument.

Classes I and II have been held taxable by this Court in the *Allied Mills* case; cited and applied, Point I, *ante*. If, as the tenor of petitioner's argument assumes, all of petitioners' sales must be treated alike, then all of them must be held taxable; for sales exactly like those involved in Points I and II have been held taxable in *Allied Mills*.

Though we recognize differences among the four classes of sales analyzed *ante*, we submit all of them are taxable because petitioner is taxed for a privilege, viz., that of doing concededly local business in Illinois and thereby fostering, by intrastate activities, an Illinois market for goods which it may ship at its election from within or without the State. This, we think, is a sufficient *nexus* between sovereign and foreign corporation doing business within the sovereign's territory to sustain a tax measured by the

gross receipts from all orders which result in ultimate delivery to petitioner's Illinois customers.

We submit that the tax in question is well within the ambit of Illinois' taxing power so far as any Federal question is concerned.

Conclusion.

For reasons apparent on the record, stated in the Illinois Supreme Court's opinion and urged in this brief, the Illinois Supreme Court's judgment should be affirmed.

Respectfully submitted,

IVAN A. ELLIOTT,
Attorney General of the State of Illinois,
Suite 900, 160 N. La Salle Street,
Chicago 1, Illinois, FInancial 6-2000,
Attorney for Respondent.

WILLIAM C. WINES,
RAYMOND S. SARNOW,
JAMES C. MURRAY,
Assistant Attorneys General,
Of Counsel.